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PREFACE TO THE THIRD EDITION.

SINCE the publication of the second edition the last chapter of the Indian Contract Act has been repealed and re-enacted in the Indian Partnership Act 1932. The present edition includes a commentary on the Indian Sale of Goods Act, 1930, and the Indian Partnership Act, 1932.

As said by the late learned author in his preface to the last edition, the commentary is in the simplest possible language as it is intended primarily as an introductory study for the use of law students. It is hoped that the addition of a synopsis of the Indian Contract Act and a chart will be of assistance to the student in viewing the whole Act in one perspective.

January 1937.

K. S. S.

Pandit,

S. R. SOMASEKHARA SARMA,
Sahitya Siromani, B. A.,

PREFACE TO THE THIRD EDITION

Since the publication of the second edition the last chapter of the Indian Partnership Act 1932 has been repealed and re-enacted in the Indian Partnership Act 1932. The present edition is a revised edition of the Indian Partnership Act 1932.

The author of the first edition has in his preface to the first edition stated that the commentary is in the simplest possible form as it is intended primarily as an introductory text for the use of law students. It is hoped that the present edition will be of assistance to the student in viewing the subject in its perspective.

K. S. S.

January 1937

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SYNOPSIS.

The first six chapters of the Act contain the general principles of the law of contract. The remaining chapters refer to particular contracts arising out of the ordinary transactions of merchants and traders. The preliminary section 2 professes to be merely terminology but in effect it declares substantive law and embodies some of the principles of the English common law. Thus a promise arises out of the acceptance of an offer or proposal, and an agreement is a promise or a set of reciprocal promises. Consideration is an act or abstinence of the promisee to do or not to do something the promisee wants done or not done. The section then classifies agreements as (1) void or not enforceable by law, (2) voidable contracts enforceable by one party only, and (3) contracts enforceable by both parties.

Chapter I refers to the formation of contracts. It sets out rules for the offer and acceptance and revocation of proposals. A proposal or acceptance may be express or implied, expressed in words spoken or written or implied from conduct. A proposal remains open until it has been accepted, or if the parties are at a distance, until the acceptor has posted his acceptance—until then it can be revoked. If the parties are at a distance the acceptor may revoke his acceptance before his letter of acceptance has reached the proposer. The acceptance must be absolute and unqualified otherwise there is no agreement. An offer or proposal may lapse if it is not accepted within a reasonable time.

Chapter II sets out the essentials of a legally enforceable agreement or contract. It states the circumstances when it is voidable or enforceable by one party only, and when the agreement is void, i.e., not legally enforceable and not a contract. These matters have been summarized in the chart or analytical statement at p. xix.

Chapter III refers to contingent contracts, i.e., contracts which are conditional on some future event happening or not happening. Contracts of insurance or of indemnity are contracts of this class. Such contracts are enforceable when the future event or loss occurs, e.g., insurance money on a policy of fire insurance is payable when the fire takes place—sec. 31. The contract may be contingent (1) on the happening, or (2) on the not happening of a future event.

(1) If it is contingent on the happening of a future event, it is enforceable when the event happens—sec. 32. If the event becomes impossible, the contract becomes void—sec. 32. *A* agrees to pay a sum of money to *B* when he marries *C*. *C* dies unmarried. The contract becomes void. If a time is fixed for the happening of the event, the contract becomes void if the event does not happen at the expiry of that time or if before the expiry

of that time the event becomes impossible—sec. 35. *A* agrees to pay *B* a sum of money if his ship returns within a year. The contract becomes void when the ship sinks within the year.

(2) If it is contingent on a future event not happening, it can be enforced when that event becomes impossible—sec. 33. *A* agrees to pay *B* a sum of money if his ship does not return. The contract is enforceable when the ship is wrecked. If a time is fixed within which the event should not happen, it may be enforced if the event does not happen at the expiry of the time or if before the expiry of that time it becomes certain that the event will not happen—sec. 35. *A* agrees to pay *B* a sum of money if his ship does not return within a year. The contract is enforceable if the ship does not return within the year, or if it is wrecked before the end of the year.

(If the future event is impossible at the time the contract is made, the contract is void whether the impossibility was known to the parties or not—sec. 36. *A* promises to pay *B* a sum of money if he marries *C*. *C* is dead at the time of the contract. The contract is void.) If the future event is the act of a living person, any conduct of that person which prevents the event happening within a definite time renders the event impossible—sec. 34.) *A* promises to pay *B* a sum of money when he marries *C*. *B* marries *D*. The event on which the contract is contingent is considered impossible although *D* may die and *B* may then marry *C*.

Chapter IV deals with the performance of contracts. A contract has for its subject the creation of an obligation between the parties. This chapter explains (1) who must perform this obligation, (2) the mode of performance, and (3) the consequences of non-performance.

✓ (1) *Who must perform.*—The promisor or his representative must perform—sec. 37, unless the nature of the contract shows that it must be performed by the promisor himself—sec. 40; but the promisee may accept performance by a third person—sec. 41. If there are joint promisors all must perform, and after the death of any of them the survivors and the representatives of the deceased must perform—sec. 42. But the liability of joint promisors is joint and several, so that the promisee may require any one of them to perform the whole promise—sec. 43, in which case there is a right of contribution even against a promisor who has been released from performance—secs. 43 and 44. If the promisees are joint the right to claim performance is joint and not joint and several. All must claim performance and, if some are dead, performance must be claimed by the survivors and the representatives of the deceased promisees—sec. 45.

✓ (2) *Mode of performance.*—The promisor must offer to perform and his offer must be (1) unconditional, (2) made at the proper time and place so as to give the promisee a reasonable opportunity of ascertaining that the

promisor is able and willing to perform the whole of his promise, and (3) if the promise is to deliver anything, to allow the promisee a reasonable opportunity of inspection—sec. 38. Performance may also be in the manner and at the time prescribed by the promisee—sec. 50. If the promise is to be performed on a certain day on application by the promisee, it is the duty of the promisee to appoint a proper place within the usual business hours—what is a proper place is a question of fact—sec. 48. If the promise is to be performed without application by the promisee, the promisor must perform within a reasonable time—sec. 46; and if a day is fixed he must perform within the usual business hours on that day and at a proper place—sec. 47 and if no place is fixed, it is the duty of the promisor to apply to the promisee to appoint a reasonable place—sec. 49. If the promises are reciprocal they must be performed simultaneously. If the contract is by *A* to deliver goods to *B* to be paid for on delivery, *A* need not deliver unless *B* is ready and willing to pay for them—sec. 51. If the order of performance of reciprocal promises is fixed by the contract, they must be performed in that order. If *A* contracts to build a house for *B* for a fixed price, *A* must build the house before *B* pays for it—sec. 52.

If the performance consists of payment of money and there are several debts to be paid, the debtor may indicate, or the circumstances may indicate, in respect of which debt the payment is made and the payment must be appropriated accordingly. Such a circumstance is the payment of the precise amount of one debt—sec. 59. If there is no appropriation express or implied by the debtor, the creditor may appropriate to any debt lawfully due—sec. 60. If there is no appropriation by either party, the payment must be appropriated in the order of time, whether the debts are time-barred or not, and if the debts are of equal standing to all rateably—sec. 61.

The mode of performance may be varied by agreement, for the promisee may dispense with or remit performance, wholly or in part, or may make a composition accepting a different satisfaction—secs. 62, 63.

✓ (3) *Consequences of non-performance.*—If an offer of performance is not accepted, the promisor is not responsible for non-performance and does not lose his rights under the contract—sec. 38, so also if the promisee fails to afford reasonable facilities—sec. 67. He may sue for specific performance or he may avoid the contract and claim compensation—secs. 39 and 53. If one party has disabled himself from performing his promise in its entirety, this anticipatory breach entitles the other party to avoid the contracts—sec. 39. So also if one party prevents the other from performing his promise—sec. 53. If reciprocal promises are to be performed simultaneously or in a certain order, one party need not perform unless the other party is ready and willing to perform—sec. 51. There is also a right to avoid the contract for failure to perform at the time fixed by the contract if time

is of the essence of the contract, but if time is not of the essence of the contract the breach gives only a right to compensation—sec. 55. A voidable contract is avoided by rescission. Rescission is communicated and revoked in the same way as a promise—sec. 66. The effect of rescission is to dispense with further performance and to render the party rescinding liable to restore any benefit he may have received from the other party—sec. 64.

Parties may agree to cancel the contract or to alter it or to substitute a new contract for it. In such cases of rescission or novation there is no question of performing the original contract—sec. 62. There is also no question of performance when an agreement becomes void or is discovered to be void, but a party who has received a benefit under such a contract is bound to restore it or to make compensation—sec. 65. If the agreement is to do an act which is impossible or which becomes impossible or unlawful it is void, but if the promisor knew and the promisee did not know that it was impossible or unlawful, the promisor must make compensation. Thus if *A* promises to marry *B* who does not know that *A* is married and that his marriage to her would be bigamous and unlawful, *A* must make compensation to *B*—sec. 56.

Chapter V refers to cases in which an obligation is created without a contract. Such obligations are treated in English law as arising out of the fiction of a contract implied by law.) In this chapter, however, the legal relations are defined and the obligations they give rise to are expressly enacted. If a person incapable of entering into a contract, or the dependents of such a person, are supplied with necessities suitable to his condition in life, the person supplying is entitled to be reimbursed out of the property of the incapable person—sec. 68. There is thus a right of reimbursement for necessities supplied to an infant or a lunatic. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other—sec. 69. A tenant who pays arrears of rent, which the zamindar is bound by law to pay, and who pays it to avoid the forfeiture of his holding, is entitled to recover it from the zamindar. A person who enjoys the benefit of a non-gratuitous act is bound to make compensation—sec. 70. If a tradesman leaves goods that have not been ordered at the house of a customer, the customer if he takes the goods is bound to pay for them. A person who finds lost property may retain it subject to the responsibility of a bailee—sec. 71. If money is paid or goods delivered under coercion, the payee or recipient must repay or make restoration—sec. 72.

Chapter VI refers to breach of contract. It has been enacted in Chapter IV that in case of non-performance by one party the other party need not perform his part of the contract and is entitled to compensation for the loss occasioned to him. This chapter explains the mode in which compensation

for breach of contract is estimated and follows the rules laid down in the leading English case of *Hadley v. Baxendale*. Damages for breach of contract must be such loss or damage as naturally arose, in the usual course of things from such breach or which may reasonably have been supposed to have been in the contemplation of the parties when they made the contract as the probable result of the breach. Damages which do not fall within this description are said to be remote or indirect and cannot be claimed. The party who suffers by the breach must take all reasonable steps to mitigate the damages and the means he had for doing so must be taken into account in estimating damages. These rules are enacted in sec. 73, and are explained by numerous illustrations. The same rules apply to breach of the non-contractual obligations referred to in the last chapter—sec. 73; and also when estimating the compensation when a party rightfully rescinds a contract—sec. 75. In case the parties have in the contract fixed a sum to be paid in case of breach it is enacted that the party who suffers is entitled to receive only reasonable compensation not exceeding the fixed sum—sec. 74. This does away with the distinction made in English law between a penalty and liquidated damages. The same rule applies to ordinary contracts with Government, but in the case of bail-bonds or recognizances given to Government for a public purpose the whole sum fixed is recoverable.

Chapter VII is repealed and re-enacted in the Indian Sale of Goods Act, 1930 (3 of 1930).

Chapter VIII refers to contracts of indemnity and guarantee. A contract of indemnity is a contingent contract and belongs to the class of contracts which are the subject of Chapter III. It is a contract between two persons by which *A* promises to save *B* from loss occasioned by the conduct of *B* or of some third person—sec. 124. Thus a contract by *A* to indemnify *B* from damages which may be decreed against him in a suit filed by *C* is a contract of indemnity. *B* is entitled to recover from *A* the damages decreed against him in *C*'s suit, and if he has acted as a prudent man unindemnified would have acted, he is also entitled to recover the costs of *C*'s suit and all sums paid under a compromise of *C*'s suit—sec. 125. In a contract of guarantee, however, there are three parties, *A* the creditor, *B* the principal debtor and *C* the surety who guarantees the default of the principal debtor—sec. 126. The debtor is called the principal debtor because the surety is also a debtor. The creditor has therefore two persons he can proceed against, for the liability of the surety is co-extensive with that of the debtor—sec. 128. The consideration for the contract of guarantee is something done by the creditor for the principal debtor. Thus *A* supplies goods to *B* because *C* guarantees payment by *B*. The supply of goods to *B* is the consideration for *C*'s guarantee—sec. 127. A guarantee may be of a series of transactions and, if so, it is called a continuing guarantee—sec. 129. As to future transactions such a guarantee is an offer which does not become a promise or agreement until the

transaction takes place. A continuing guarantee may therefore as to future transactions be revoked by notice to the creditor—sec. 130; and is revoked as to future transactions by the death of the surety—sec. 131. A guarantee by a surety may be conditional on another person joining as co-surety—sec. 144. A contract of guarantee if obtained by misrepresentation is invalid—secs. 142 and 143. Co-sureties are liable equally, subject to any contract to the contrary between themselves—sec. 146. Co-sureties are joint promisors, so on the principle of sec. 44 if one is released by the creditor, he is still responsible to the other sureties—sec. 138. If co-sureties have bound themselves in different sums they are still equally liable up to those amounts—sec. 147. Thus three co-sureties *A*, *B* and *C* are liable up to Rs. 10,000, Rs. 20,000 and Rs. 40,000 respectively for a debt of Rs. 40,000, *A* is liable to pay Rs. 10,000 and *B* and *C* Rs. 15,000 each. Co-sureties may contract with each other that one shall be liable only in default of the other. But if the creditor is not a party to the contract, his rights are not affected—sec. 132. A surety has a right to be indemnified by the principal debtor for any sums he has rightfully paid in performance of his obligation—sec. 145. He is also subrogated to the rights of the creditor and is invested with all the rights and securities which the creditor had against the principal debtor—secs. 140 and 141. If the debt is secured by a mortgage and the surety pays the debt he is entitled to enforce the mortgage. The surety guarantees the performance of the contract of the principal debtor. Therefore any variance of that contract without the consent of the surety discharges the surety for transactions subsequent to such variance—sec. 133. For the same reason the surety is discharged if the creditor without his consent makes a composition with the principal debtor or gives him time—sec. 135. The surety is also discharged if the creditor does any act which impairs the rights of the surety or his remedy against the principal debtor—sec. 139. So if the creditor parts with a security for the debt the surety is discharged to the extent of the value of the security—sec. 141, and he is wholly discharged, if he without the assent of the surety releases or gives time to or promises not to sue the principal debtor—secs. 134 and 135. But an agreement between the creditor and a third person not to sue the principal debtor is not enforceable by the principal debtor and has no effect on the liability of the surety—sec. 136. Mere passive inactivity on the part of the creditor, such as forbearance to sue, does not discharge the surety—sec. 137.

Chapter IX refers to bailment. Bailment is defined as a delivery of goods by one person to another for some purpose upon a contract that when the purpose is accomplished the goods are to be returned or disposed of according to the directions of the bailor—sec. 148. The chapter makes no classification of bailments, but bailments of loan and hiring and for work to be done are expressly referred to, while bailments of pledge are separately dealt with.

Delivery to the bailee is effected by doing anything which has the effect of putting the goods in possession of the bailee or of some one on his behalf—sec. 149. It is the duty of the bailor to disclose to the bailee defects of which he is aware and if he does not he is liable for damage caused to the bailee—sec. 150. If *A* lends *B* a gun which he knows is likely to burst, he must warn *B* of the defect in the gun, for the object of bailment is to confer a benefit, and not to do a mischief. If the bailment is for hire the bailor is responsible for a defect in the thing bailed whether he was aware of its existence or not—sec. 150. It is the duty of the bailee to take as much care of the goods bailed as a man of ordinary prudence would take of his own goods—sec. 151; and if he takes such care he is not responsible for their loss—sec. 152. So that if the goods are stolen from the bailee without any fault of his, the bailee is not liable. But the bailee must observe the conditions of the bailment and if he makes an unauthorized use of the goods bailed the bailor may avoid the contract and is entitled to compensation for damage due to such use—secs. 153 and 154. *A* hires his horse to *B* for riding. *B* drives the horse in a carriage. The horse falls and is injured, *A* may take back the horse and claim damages. The bailee must return the goods bailed to the bailor when the time for which they were bailed has expired—sec. 160. If the goods do not belong to the bailor, he must make compensation to the bailee for any loss he may sustain by reason of the bailor's want of title—sec. 164; but the bailee acting in good faith is not responsible if he returns the goods to the bailor—sec. 166. But in such a case the real owner may apply to the Court to stop delivery—sec. 167. If the goods are not returned at the proper time, the bailee is responsible for any loss or deterioration in the goods—sec. 161. As it is the duty of the bailee to return the identical goods he must not mix the goods bailed with his own goods without the consent of the bailor. If the bailor consents, they both have an interest in the mixture in proportion to their shares—sec. 155. If the bailor does not consent and the goods are separable the bailee must bear the expenses of their separation—sec. 156. If the goods cannot be separated, the bailee must compensate the bailor—sec. 157.

If the bailment is gratuitous the bailee is entitled to be repaid any expenses incurred for the purpose of the bailment—sec. 158. Again if the bailment is gratuitous the bailor may take back the thing bailed at any time, but if the net result of the transaction is loss to the bailee, he is entitled to be compensated by the bailor—sec. 159. If the bailment is for skilled work to be done, the bailee is entitled to the stipulated remuneration or reasonable remuneration for his services, and to a lien, *i.e.*, a right to retain the goods until he is paid—sec. 170. If *A* leaves his watch with *B* to be repaired, *B* is entitled to be paid and to retain the watch until he is paid. This is a particular lien, for *B* holds the watch as security for the payment due to him for repair of the watch. But certain specified bailees, *viz.*, bankers, factors, attorneys and policy brokers are entitled to a general lien, *i.e.*, a right to retain

goods bailed to secure other debts as well, such as a general balance of account—sec. 171.

If goods are lost, the finder is under no obligation to take charge of them, but if he does, he is a gratuitous bailee. He is entitled to compensation for trouble and expense in keeping the goods and discovering the owner or to the reward, if the owner has offered a reward. He may also retain the goods until he is paid such compensation or reward—sec. 168. If the goods are saleable and the owner cannot be found or refuses to pay or compensate, the finder may sell the goods if they are perishable or if his charges amount to two-thirds of their value—sec. 169.

Pledge.—A bailment of goods as security for a debt or promise is called a pledge. The bailor is called the pawnor and the bailee is called the pawnee—sec. 172. The pawnee retains the goods as security for the debt and interest and necessary expenses incurred for the custody and preservation of the goods—sec. 173, but unless there is an agreement to that effect he is not entitled to retain the goods for any debt or promise other than the debt or promise for which they were pledged, except subsequent advances—sec. 174. For extraordinary expenses, i.e., expenses other than necessary expenses, the pawnee has only a personal remedy against the pawnor—sec. 175. The pawnor may redeem the goods at the stipulated time by payment of the debt, and after that time by payment of the debt and of additional expenses incurred by his default—sec. 177. On the other hand, in default of payment by the pawnor, the pawnee may sue for his debt, or may after reasonable notice to the pawnor sell the goods. The pawnor is liable for any deficit on such sale and is entitled to the surplus sale proceeds if any—sec. 176. If the pawnor has only a limited interest in the goods the pledge is valid to the extent of that interest—sec. 179. If the pawnor has ostensible authority to pledge, the pledge is valid unless the pawnor has notice of the want of real authority. Thus a pledge by a mercantile agent who has by custom authority to dispose of goods which are in his possession or of which he holds documents of title, is valid unless the pawnee has notice of want of authority—sec. 178. A pledge of documents of title is equivalent to a pledge of the goods. Similarly a pledge by a person in possession under a contract voidable for fraud or misrepresentation or undue influence is valid unless the pawnee had notice of the pawnor's defect of title—sec. 178A.

Right of suit.—If the bailee is deprived of the goods bailed by the wrongful act of a third person, both the bailee and the bailor have a right to bring a suit—sec. 180. The compensation awarded in such suit must be apportioned between them in the proportion of their interests—sec. 181.

Chapter X refers to *Agency*.—Agency is created when a man employs another to do an act for him or to represent him in dealings with third persons. A contract between *B* and *C* does not bind *A*. But if *B* has been employed by *A* to make the contract, *A* is really the contracting party. *A* is called

the principal and *B* who acts on his behalf is called the agent—sec. 182. The principal must have contractual capacity, *i.e.*, he must be of the age of majority and of sound mind; but this is not necessary in the case of the agent, for he is not the contracting party, but only the mouthpiece of the principal—secs. 183 and 184. The employment of an agent may be gratuitous—sec. 185. The authority of an agent may be expressed, *e.g.*, in a power of attorney or it may be implied from the circumstances of the case or the relationship of the parties, *e.g.*, husband and wife, solicitor and client, owner and manager of a shop—secs. 186 and 187. An agent employed for a particular act has authority to do everything necessary and incidental to that act, *e.g.*, an agent to carry on the business of a shipbuilder may purchase timber and hire workmen—sec. 188. An agent has also authority of necessity to act in case of emergency to save his principal from loss provided he acts as a man of ordinary prudence would act—sec. 189. Thus a warehouseman may incur expenses to save the goods in case of fire. As a general rule an agent has no authority to appoint a sub-agent. This is the rule expressed in the maxim *delegatus non potest delegare*. There are, however, exceptions arising out of custom of trade or the nature of the agency—secs. 190 and 191. Thus an architect has authority to appoint a qualified sub-agent to take measurements and to make calculations. An agent must exercise the discretion of a man of ordinary prudence in selecting a sub-agent and if he does not, he is responsible for the sub-agent's negligence—sec. 195. If the sub-agent is properly appointed he is just as much an agent of the principal as the original agent. The principal is as to third parties bound by, and responsible for, the acts of the sub-agent; but the sub-agent is responsible to the agent, and the agent is responsible to the principal—sec. 192. When an agent has authority to name another person to act for the principal and does so, the latter is not a sub-agent of the agent, but a substituted agent of the principal. He stands in the shoes of the agent and is directly responsible to the principal. So if a principal instructs a solicitor to find an auctioneer for the sale of an estate, the auctioneer sells the estate as agent of the principal—sec. 194. If the agent has exceeded his authority in the appointment of a sub-agent the principal is in no way bound, for there is no privity of contract between him and the sub-agent. Moreover the agent is in such a case responsible to the principal and to third persons for the acts and defaults of the sub-agent—sec. 193.

Agency by ratification.—A person may be constituted an agent by ratification as when *A* adopts a contract made on his behalf but without his authority by *B*. Such an adoption of the contract is equivalent to a previous authority and makes *B* the agent of *A*—sec. 196. But the act must have been done by *B* on behalf of *A*. If *B* forges *A*'s name on a promissory note, *A* cannot ratify the act and adopt the promissory note as his own, for *B* was acting on his own account. Ratification may be express or implied by conduct—sec. 197. Thus if *B* buys goods for *A* without authority and *A* accepts them, that is an implied

ratification of *B*'s purchase. But there can be no valid ratification unless the ratifier has full knowledge of all the advantages and disadvantages so as to justify the inference that he ratifies the acts whatever they are—sec. 198. But the ratifier must ratify all or none. He cannot ratify a part of the transaction which is advantageous to him and disown the rest—sec. 199. So when the master of a ship exceeded his authority by entering into a charterparty to alter the ship into a troopship and carry troops, the owner could not claim the freight and yet refuse to bear the expenses of the alteration. Again the principal cannot ratify an act so as to prejudice a third person. If the agent not being authorized gives notice to quit to a tenant the principal cannot ratify the act so as to determine the tenancy—sec. 200.

Termination of agency.—An agency is terminated by the act of parties or by operation of law. By act of parties (a) when the principal revokes his authority, or (b) when the agent renounces the agency. By operation of law (a) when the business of the agency is completed, or (b) by the death or lunacy of the principal or agent, or (c) by the insolvency of the principal—sec. 201. The principal may revoke his authority at any time before it has been completely exercised; but if it has been partly exercised, the principal cannot revoke his authority as to acts already done—secs. 203 and 204. Again if the agreement is that the agency shall continue for a fixed time, revocation by the principal before the expiry of that time is a breach of contract for which the principal must make compensation and conversely if the agent renounces before the expiry of the fixed time he must make compensation—sec. 205. Another restriction on the principal's power to revoke his authority occurs when the agent has an interest in the subject-matter of agency. In such a case the authority is regarded as security for that interest and cannot be revoked to the prejudice of that interest—sec. 202. *A* consigns goods to *B* and authorizes *B* to sell the goods at a fixed price and to pay himself out of the sale proceeds a debt which *A* owes to *B*. *A* cannot revoke the authority until the debt is paid. Revocation and renunciation may be express or implied but if the principal revokes or the agent renounces before the business of the agency is completed, the other party may be put to loss. Therefore reasonable notice must be given or compensation paid—secs. 206 and 207. Although the agency is terminated by the death or unsoundness of mind of the principal, the agent must take on behalf of the representatives of the late principal reasonable steps for the protection of their interests—sec. 209. A sub-agent's authority terminates with that of the agent—sec. 210. Even after the termination of the agency the principal may be liable to third persons by the rule of estoppel. *A* has held out *B* to be his agent and had induced persons to deal with *B* as his agent. It would be unfair to such third persons to affect them with knowledge of the revocation unless they had been informed of it—sec. 208.

Rights of principal and agent inter se.—It is the duty of the agent to act in accordance with the instructions or with usage affecting the particular business. The agent has no discretion to disregard instructions and if he does so he is responsible for the loss, and if he thereby makes a profit he must make good the profit—sec. 211. In cases of difficulty he must communicate with the principal and seek his instructions—sec. 214. As he has been selected by the principal for the conduct of his business he must conduct the business with such skill and diligence as he possesses and he is responsible for such skill as is usual and requisite—sec. 212. It is his duty to render an account of all moneys he has received on account of the principal—sec. 213. But he is entitled to deduct moneys due to himself for advances made or expenses incurred in the business of the agency and for his remuneration—secs. 217 and 218. The relationship of principal and agent is a fiduciary relationship entailing on the agent the duty of fullest disclosure if he has a personal interest in the business of the agency. He must not deal in that business on his own account without the consent of the principal. If he does the principal may repudiate the transaction—sec. 215; or claim for himself any profit that the agent has made—sec. 216. The agent's remuneration is not due until the completion of the business of the agency and may be forfeited for misconduct—secs. 219 and 220. In regard to his remuneration and his disbursements the agent has a right of retainer of moneys or goods received for his principal—secs. 217 and 221. The agent has also a right to be indemnified by the principal for all liabilities incurred by him for lawful acts done by him in the performance of the agency—sec. 222 and even for acts done by him in good faith in the performance of his duties which make him liable in damages to a third person—sec. 223. But he is not entitled to an indemnity if the act is not done in good faith or if the act is criminal—secs. 223 and 224. The agent has a right to be compensated by the principal for any injury caused to himself by the principal's neglect or want of skill—sec. 225.

Dealings with third parties.—If a person contracts as agent for a principal he is only the mouthpiece of the principal. The acts and knowledge of the agent are the acts and knowledge of the principal—sec. 229. The agent cannot sue or be sued on the contract—secs. 226 and 230. But the agent may make himself liable as a contracting party (1) when the contract is for the sale or purchase of goods for a foreign merchant, (2) when the agent does not disclose the name of the principal, and (3) when the principal cannot be sued—sec. 230. If the agent is personally liable the third person dealing with him may hold either the agent or the principal or both liable—sec. 233. But if he has obtained a judgment against the agent he cannot proceed against the principal and conversely if he has obtained a judgment against the principal he cannot hold the agent liable—sec. 234. If the agent is personally liable either the agent or the principal may sue on the

contract, but if the principal who sues has permitted the agent to hold himself out as principal the defendant has the same right of set off and other defence as he would have had against the agent—sec. 232. A person who falsely represents himself to be an agent is not entitled to shift his position. He cannot adopt the contract as his own and sue as principal—sec. 236. Moreover the person with whom he contracts is entitled to damages for breach of the implied warranty of authority—sec. 235. If the agent has no authority or has acted in excess of his authority the principal is not bound. But in such a case the principal may be bound by the rule of estoppel. This is when the principal has held out the agent as having the requisite authority—sec. 237. If the agent while acting in the business of the agency has been guilty of fraud or misrepresentation the agent's contract is voidable against the principal—sec. 238.

Chapter XI, which dealt with partnership, is repealed and re-enacted in the Indian Partnership Act, 1932 (IX of 1932).

Enforceable. Contract—s. 2(h)	Not enforceable. Void agreement—s. 2(g).	Enforceable by one party only. Voidable contract—s. 2(i).
Requisites.	Invalidating Causes.	Voidable in inception. Voidable by subsequent default.
(a) Competent person— —ss. 11 & 12.	(a) Consideration or object unlawful—s. 23 as being (i) forbidden by law (ii) defeating the provisions of any law (iii) fraudulent (iv) injurious to person or property of another (v) immoral or opposed to public policy—	(a) where offer of performance is not accepted—s. 38. (b) when one party prevents performance of reciprocal promise—s. 53.
(b) Free consent—s. 14.	(b) Without consideration—s. 25 unless (i) by writing registered, between near relations out of natural love and affection. (ii) to compensate a person for something voluntarily done for the promisor or which the promisor was bound to do. (iii) in writing to pay a time-barred debt.	(c) when a party fails to perform at the time fixed if time of the essence of the contract—s. 55.
(c) Lawful consideration— —ss. 2(d) & 23.	(c) in restraint of the marriage of a person not a minor—s. 26.	(d) consent caused by fraud—ss. 14, 17 & 19
(d) Not declared to be void— —ss. 25-30.	(d) in restraint of trade—s. 27 (saving the sale of a goodwill). (e) in restraint of legal proceedings—s. 28 (saving references to arbitration). (f) by way of wager—s. 30. (g) of uncertain meaning—s. 29. (h) to do an act which is impossible or becomes impossible—ss. 35, 36 & 56. (i) mistake of both parties as to essential matter of fact—s. 20. (j) mistake of both parties as to foreign law—s. 21.	(b) consent caused by coercion—ss. 14, 15 & 19. (c) consent caused by misrepresentation—ss. 14, 18 & 19. (d) consent caused by undue influences—ss. 14, 16 & 19A.

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THE INDIAN CONTRACT ACT

(ACT IX OF 1872)

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows:—

S. 1

Preamble.

Preliminary.

Short title.

1. This Act may be called the Indian Contract Act, 1872.

Extent.
Commencement.

It extends to the whole of British India; and it shall come into force on the first day of September, 1872.

Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract (a), not inconsistent with the provisions of this Act.

Enactments repealed.

Law anterior to Contract Act; Introduction of English Law into India.—The charters of the eighteenth century which established Courts of justice for the three presidency-towns of Calcutta, Madras and Bombay, introduced into their jurisdictions the English common and statute law in force at the time so far as it was applicable to Indian circumstances. The indiscriminate application of English law to natives of India within the jurisdiction of the Supreme Courts led to many inconveniences. To obviate this, the statute of 1781 (21 Geo. III. c. 70, s. 17) empowered the Court at

(a) The words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade". In the section as

cited by the Judicial Committee there is no comma after "contract": *Irrawaddy Flotilla Co. v. Buguandas* (1891) L. R. 18 I. A. 121, 127; 18 Cal. 620, 627.

S. 1 Calcutta (being then the Supreme Court), and the statute of 1797 (37 Geo. III. c. 142, s. 13) empowered the Courts of Madras and Bombay (being then the Recorders' Courts), to determine all actions and suits against the inhabitants of the said towns, provided that their succession and inheritance to lands, rents, and goods, and all matters of *contract* and dealing between party and party, should be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos (Hindus) by the laws and usages of Gentoos, and where only one of the parties should be a Mahomedan or Gento by the laws and usages of the defendant. The effect of these statutes was to supersede English law so far as regards Hindus and Mahomedans in the case of contracts and other matters enumerated in the statutes, and to declare the right of Hindus and Mahomedans to their own laws and usages. The result was that in a suit on contract, for instance, between Hindus, the Hindu law of contract was applied, and the Mahomedan law in the case of a contract between Mahomedans, and this continued upto the enactment of the Indian Contract Act.

Applicability of the Act.—The second clause of sec. 1 of the Act says in the most general terms that the Act is to extend to the whole of British India. These words are large enough to include all Courts and persons of all denominations. The third clause of sec. 1 provides that nothing contained in the Act shall affect the provisions of any statute not thereby expressly repealed. The schedule of the Act enumerates the enactments repealed by the Act, but this enumeration does not include the provision in the statutes of 1781 and 1797 directing Hindu law to be applied to Hindus and Mahomedan law to Mahomedans. It was, however, held in *Madhub Chunder v. Rajcoomar Doss* (b) that the Act did apply to Hindus, having regard to the general words used in cl. 2 of the section.

Scope of the Act.—The Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. The Act deals with particular contracts in separate chapters, but the Legislature has not dealt exhaustively with any particular chapter or sub-division of the law relating to contracts (c).

How far native Law of Contracts is still in force.—As the Contract Act is not exhaustive cases may occur which are not covered either by the Contract Act or by any special enactment relating to contracts. In such

(b) (1874) 14 B. L. R. 76.

(c) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) L. R. 18 I. A. 121; 18 Cal. 620, 628, 629, cited in (1929) L. R. 56 I. A. at p. 178. "The Act, so far as it goes, is exhaustive

and imperative": *Mohori Bibee v. Dhurmodas Ghose* (1903) L. R. 30 I. A. 114, 125, 30 Cal. 539, 548. See also *Ramdas v. Amarchand & Co.* (1916) L. R. 43 I. A. 164, 170, 40 Bom. 630, 636.

cases the High Courts in the exercise of their original jurisdiction are bound to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. An instance of such a case is the Hindu rule of damdupat according to which interest in excess of principal cannot be recovered at any one time. This rule is in force in the Bombay Presidency (d) and in the presidency-town of Calcutta (e), but it is not recognized outside that town (f) nor in the Madras Presidency (g). Such cases are however very rare and for all practical purposes the native law of contract has been superseded by the Contract Act and special enactments relating to particular contracts.

Saving of usage or custom of trade, etc.—The term “usage of trade” is to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles, and analogies, and, according to the opinion now received, can still be increased by proof of living general (not merely local) usage (h). A particular usage remains unaffected by the provisions of the Act even though it may be inconsistent with those provisions. The words “not inconsistent with the provisions of the Act” apply only to the immediately preceding words “any incident of any contract” and are not connected with the words “usage or custom of trade” (i). But a general or universal usage pervading all trades has no binding force if it is inconsistent with the provisions of the Act. Such general usage is equivalent to a general law and no such general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself (j).

Not inconsistent with the provisions of this Act.—A stipulation in a contract of guarantee that the surety shall not have the benefit of sec. 133 has been held to be inconsistent with the Act (k).

Evidence as to usage of trade.—Section 92 (5) of the Indian Evidence Act, 1872, enacts that though the terms of a contract have been reduced to writing oral evidence may be given of any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description. That section, however, requires that such incident shall

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| <p>(d) <i>Dhondu v. Narayan</i> (1863) 1 B. H. C. 47; <i>Harilal v. Nagar</i> (1896) 21 Bom. 48.</p> <p>(e) <i>Nobin Chunder v. Romesh Chunder</i> (1887) 14 Cal. 781.</p> <p>(f) <i>Het Narain v. Ram Deni</i> (1883) 12 C. L. R. 590.</p> <p>(g) <i>Annaji Rou v. Ragubai</i> (1883) 6 Mad. H. C. 400.</p> <p>(h) See <i>Bechuanaland Exploration Co. v. London Trading Bank</i> [1898]</p> | <p>2 Q. B. 658; <i>Edelstein v. Schuler & Co.</i> [1902] 2 K. B. 144.</p> <p>(i) <i>Irrawaddy Flotilla Co. v. Bugwandas</i> (1891) 18 I. A. 121, 127, 18 Cal. 620, 627; <i>In re McCorkindale</i> (1881) 6 Cal. W. N. 1.</p> <p>(j) <i>Moothora Kant Shaw v. The India General Steam Navigation Co.</i> (1883) 10 Cal. 166, 185.</p> <p>(k) <i>Chitguppi & Co. v. Vinayak Kasi-nath</i> (1921) 45 Bom. 157, 22 Bom. L. R. 659.</p> |
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not be inconsistent with the express terms of the contract (l). This section of the Contract Act also requires that it shall not be inconsistent with the general provisions of the Contract Act.

Sections referring to usage or custom of trade.—Sec. 190 enacts that an agent cannot delegate his authority to another unless allowed by the “ordinary custom of trade.” Similarly an agent is bound, in the absence of directions from the principal, to conduct business according to “the custom which prevails in doing business” of the same kind at the place where the agent conducts such business (s. 211). It may here be observed that the expression “usage or custom of trade” used in sec. 1, as well as the sections referred to above, relates to a particular usage as distinguished from a general or universal usage. A general usage pervading all trades has no binding force, if it is inconsistent with the provisions of the Act. A general usage is equivalent to a general law, and no general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself (m).

The Transfer of Property Act IV of 1882, sec. 4, provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.

Act not retrospective.—The provisions of this Act do not apply to contracts made before the Act came into force (n).

2. In this Act the following words and expressions are used in the following senses, unless Interpretation clause. a contrary intention appears from the context :

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise :
- (c) The person making the proposal is called the “promisor,” and the person accepting the proposal is called the “promisee” :

(l) See *Ruttonsi Rowji v. Bombay United Spinning and Weaving Co.* (1917) 41 Bom. 518, at pp. 538, 540.

(m) *Moothora Kant Shaw v. The India*

General Steam Navigation Co. (1883) 10 Cal. 166, 185.

(n) *Omda Khanum v. Brojendro* (1874) 12 B. L. R. 451, 458 ; *ib.*, p. 472, on appeal.

- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise :
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement :
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises :
- (g) An agreement not enforceable by law is said to be void :
- (h) An agreement enforceable by law is a contract :
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Agreement.—The effect of clauses (a) to (f) is that an agreement is a promise or a set of reciprocal promises ; that a promise is formed by the acceptance of a proposal ; and that there must be a promisor who makes the proposal and a promisee who accepts it. In the case of reciprocal promises each party is a promisor as to the promise he makes and a promisee as to that which he receives ; he is both proposer and acceptor, proposing to become liable and accepting the other's liability. The mutual proposals of the two parties become promises by mutual acceptance ; whatever may have happened before the promises are exchanged is merely preliminary negotiation, and does not enter into the legal analysis of the transaction.

Proposal and promise.—The word "proposal" is synonymous in English use with "offer." But the language of these definitions appears to confine "proposal" to an offer to be bound by a promise. Thus a man who offers to sell and deliver, then and there, existing portable goods in his immediate control, such as a book or a jewel, does not offer a promise but an act, and if the other party takes the goods on the spot and becomes liable to pay for them, he (the buyer) is the only promisor. A quotation of prices is not an offer, but an invitation for offers (o) ; the same is true of many common forms of advertisement.

(o) *Mylappa Chettiar v. Aga Mirza Mohamed Sherazee* (1919) 37 Mad. L.T. 712; op. *Secretary of State*

v. Madho Ram (1928) 10 Lah. 493, 502.

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The Act does not say, but it seems to imply, that every promise is an accepted proposal. At the Common Law this is not so, for a binding promise may be made by deed, that is, by writing under seal, without any communication between the parties at all. This is because the deed, as an ancient formal method of proof, was conclusive against its maker. The party's solemn admission that he was bound originally excluded all defence. The practice of executing deeds in the English form and the legal doctrines exclusively applicable to such instruments have never been introduced in India. It is difficult at first sight to say, without doing some violence to language, that in the common affairs of life a promise is always an accepted proposal. Take the case of a man offering to sell and deliver goods on credit, then and there, to another who at first does not want the goods, but is finally persuaded to take them at a price named by the seller. Here the seller delivers the goods and receives in exchange the buyer's promise to pay for them. Now the buyer's promise has never been a proposal; the seller offered to sell, and the buyer accepted the offer by taking the goods and pledging his credit. It may be said, however, that the buyer must be deemed to adopt the seller's terms at the last moment before delivery of the goods. For the seller will not deliver them unless he knows that he will get the buyer's promise to pay for them; and the only way in which he can be sure of this is the existence of a proposal from the buyer to become liable for the price, which proposal will become a promise on the goods being delivered. These reasons appear to be sound, and sufficient on principle to justify the language of the Act.

Promise and Consideration.—The technical use of the word "promise" in the Act is far narrower than the popular use. Express words of promise may be and often are in law no more than a proposal (*p*). In common life many promises are made, and regarded as morally binding between one person and another, without any "view to obtaining the assent of that other" to the contents of the promise. In common speech no one thinks of acceptance by the promisee as being an essential condition which must be satisfied before a declaration of intention amounts to a promise. Apart from the peculiar case of a promise made by deed, English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value, and the parties treat as such by making it a subject of bargain. The value so received in exchange for the promise may consist in present performance, for example the delivery of goods, or it may itself be the promise of a performance to come. These elements are embodied in the definition of consideration by cl. (d) of our section.

(*p*) Thus a letter requesting a loan of money, and promising repayment with interest on a certain day, is not a promissory note but a mere proposal for a loan: *Dhondbhai*

v. Atmaram (1889) 13 Bom. 669; *Narayanasami v. Lokanibalammal* (1897) 7 Mad. L. J. 220.

Definition of Consideration.—The terms of the Indian definition must now be examined. They do not appear to follow those of any authoritative English exposition.

"At the desire of the promisor."—The act constituting the consideration must have been done at the desire or request of the *promisor*, as when a person contracts a marriage in consideration of a promise of a settlement (g). An act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff, not at the desire of the defendants, but of the collector of the place, is void under sec. 25, being without consideration (r). Nor can it be supported under cl. 2 of that section, which enacts that an agreement without consideration is void, unless it is a promise to compensate a person who has already voluntarily done something for the promisor. The expression "voluntarily" appears to be used in contradistinction to the words "at the desire of the promisor" (s). A voluntary subscription, even if repeated, is not in itself evidence of a promise to subscribe (t).

"Or any other person."—In modern English law it is well settled that consideration must move from the promisee. Under the Act, however, consideration may proceed from the promisee or *any other person*. The result, according to the decisions now to be cited, is to restore the doctrine of some earlier English decisions which are no longer of authority in England. In *Dutton v. Poole* (u), decided so far back as 1688, where the father of a bride was about to fell timber on his estate to provide a marriage portion for her, and refrained from doing so on the eldest son promising to pay the amount to her, it was held that the daughter could maintain an action against the son on the promise to the father. It will be observed that no consideration proceeded from the daughter. She was not a party to the contract, and the whole consideration moved from the father. On the faith of the son's promise, the father abstained from felling the timber, and as a result the estate with the timber descended to the son as the heir-at-law. The ground of the decision was that, having regard to the near relationship between the plaintiff (daughter) and the party from whom the consideration moved (father), the plaintiff might be considered a party to the consideration. That is to say, a stranger to the consideration could, by construction of law, be regarded as a party to it, if he was closely related to the person from whom the consideration actually proceeded. But this decision is no longer law in England, and was finally set aside by *Tweddle v. Atkinson* (v). In that case, decided in 1861, an agreement was entered

(g) *Nanjunda Swami Ohetti v. Kanagaraju* (1919) 42 Mad. 154, 159.
See *Vishveshvar v. Sadashiv* (1925) 27 Bom. L. R. 1456.
(r) *Durga Prasad v. Baldev* (1880) 3 All. 221.

(s) *Sindha Shri Ganpalsingji v. Abraham* (1895) 20 Bom. 755, 753.
(t) *Jiban Krishna Mullick v. Nirupama Gupta* (1926) 53 Cal. 922.
(u) 2 Lev. 210.
(v) 1 B. & S. 393.

S. 2 into between the respective fathers of a husband and wife that each should pay a sum of money to the husband, and that the husband should have full power to sue for such sums. After the death of both the contracting parties the husband sued the executors of the wife's father upon the above agreement, but the action was held not to be maintainable. The husband was a stranger to the consideration, and the plea of nearness of relationship to the contracting parties was regarded as of no consequence. As to *Dutton v. Poole*, it was said that there was no modern case supporting that decision and its authority was treated as overruled. It may now be taken as an established rule of English law that a third party cannot sue on a contract though made for his benefit, and the nearness of relationship cannot be invoked to import what may be called constructive consideration. However, *Dutton v. Poole* was relied on, and *Tweddle v. Atkinson* distinguished, by Innes, J., in *Chinnaya v. Ramayya (w)* in the High Court of Madras. In that case, A, by a deed of gift, made over certain property to her daughter, with a direction that the daughter should pay an annuity to A's brother, as had been done by A. On the same day the daughter executed a writing in favour of the brother agreeing to pay the annuity. The daughter declined to fulfil her promise, and the brother sued the daughter to recover the amount due under the agreement. On behalf of the daughter it was contended that no consideration proceeded from the brother, and that he, being a stranger to the consideration, had no right to sue. Innes, J., held, following *Dutton v. Poole (x)*, that the consideration *indirectly* moved from the brother to the daughter, and that he was, therefore, entitled to maintain the suit. In a later Madras case (y), the administratrix of the estate of a deceased person agreed to pay one of the heirs of the deceased his full share of the estate if the heir gave a promissory note for a proportionate part of a barred debt due to a creditor of the estate. The heir executed a promissory note in favour of the creditor, gave it to the administratrix, and received his full share in the estate. The note was subsequently handed over by the administratrix to the creditor. In a suit by the creditor against the heir on the note, it was held that the act of the administratrix in handing over to the heir his share of the estate without deducting any portion of the debt constituted consideration for the heir's promise to the creditor, and that the creditor could recover upon the note.

In both the Madras cases the consideration proceeded from a *third party*, and therefore the suit would not have been maintainable according to the modern English law.

But though under the Act the consideration for an agreement may proceed from a third party it does not follow that the third party can sue on the agreement. There has been some divergence of opinion on this point

(w) (1881) 4 Mad. 137
(x) (1888) 2 Lev. 210.

(y) *Samuel v. Ananthanatha* (1883) 6 Mad. 351.

and the cases are collected in a Full Bench decision of the Madras High Court (z). The best statement of the law is that of Rankin, C.J., in *Krishna Lal Sadhu v. Pramila Bala Dasi* (a). His Lordship said: "Clause (d), section 2, Contract Act, widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary promise and refuse him a right of action on the ground of *nudum pactum*. Not only is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'." The English law is the same and Lord Haldane said that it was a fundamental principle of English law that only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract (a1). The English law admits, however, of an equitable exception when the contracting party is a trustee for a third person (b) or when the third person is a beneficiary under a marriage settlement (b1). This equitable exception was applied in India by the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam* (c). The father of the bridegroom had contracted with the father of the bride to make the daughter an allowance called *Kharch-i-pandan* if she married the son. After the marriage the daughter sued her father-in-law to recover arrears of the allowance. The Privy Council held that though she was no party to the contract yet "she was clearly entitled in equity to enforce her claim." A subsequent Calcutta case has suggested that in India there is no reason to fall back on this equity and that a person who takes a benefit under a contract may sue on the contract (c1). This case is, it is submitted, incorrect and has been dissented from by the Bombay High Court (c2). It is directly opposed to the decision of the Privy Council in *Jamna Das v. Ram Autar* (d) that a purchaser's contract to pay off a mortgage cannot be enforced by the mortgagee who was no party to the contract.

But where a contract between *A* and *B* is intended to secure a benefit to *C* as a *cestui que trust*, *C* may sue in his own right to enforce the trust. And this seems to be the principle underlying the decision of the Judicial Committee in *Khwaja Muhammad Khan v. Husaini Begam* (d1). In that case *C* sued her father-in-law, *A*, to recover arrears of certain allowances called *Kharch-i-pandan*, payable by *A* to *C* under an agreement made between *A* and *C*'s father prior to and in consideration of *C*'s marriage with

(z) *Subbu v. Arunachalam* (1930) 53 Mad. 270, 124 I. C. 55, ('30) A. M. 382.
(a) (1928) 55 Cal. 1315, ('28) A. C. 518.
(a1) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (1915) A. C. 847 cited in *Vandepille v. The Preferred Accident Insurance Co.* (1933) 64 Mad. L. J. 133, 143 I. C. 79, ('33) A.P.C. 11.

(b) *Fletcher v. Fletcher* (1844) 4 Hare 67.
(b1) *Gandy v. Gandy* (1885) 30 Ch. D. 57.
(c) (1910) 32 All. 410, 37 I. A. 152.
(c1) *Kshirodebihari v. Mangobinda* (1934) 61 Cal. 841.
(c2) *National Petroleum Co. Ltd. v. Popatlal* (1936) 38 Bom. L. R. 610.
(d) (1912) 34 All. 63, 39 I. A. 7.
(d1) (1910) 32 All. 410; L. R. 37 I. A. 152.

S. 2 *A's* son, *D*. Both *C* and *D* were minors at the date of the marriage. The agreement created a distinct charge in favour of *C* on certain immovable property belonging to *A* for the payment of the allowance. It was contended on behalf of *A*, on the authority of *Tweddle v. Atkinson* (*e*), that *C* could not sue upon the contract, as she was no party to the agreement. But this contention was overruled, and the suit was decreed. Their Lordships said that in India and among communities circumstanced as the Mohamedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or assignments entered into in connection with such contracts.

The principle of *Khwaja Muhammad's case* has been followed by the Calcutta High Court (*f*); and it seems that generally the beneficiary of a benami transaction may sue joining the *benamidar* (*g*).

The same principle has been applied by the Courts of India to cases where a provision is made for the maintenance of female members of a Hindu family on a partition of the joint family property between the male members. The female members, though not named as parties to the contract, possessed an actual beneficial right which placed them in the position of *cestuis que trust* under the contract (*h*). Similarly where a provision is made for the marriage expenses of a female member of a Hindu family on a partition of the joint family property between the male members, the female member is entitled to sue the parties to the partition deed to enforce the provision in her favour (*i*).

Past consideration.—The words “has done or abstained from doing” are a recognition of the doctrine of past consideration. They embody the rule in *Lampligh v. Brathwait* (*j*) that a past consideration to support a promise must be moved by a previous request. The general principle is that the consideration is given and accepted in exchange for the promise. As the consideration and promise are simultaneous the consideration must always be present. A consideration if past may be the motive but cannot be the real consideration of a subsequent promise. But if services have been rendered in the past at the request or desire of the promisor the subsequent promise is regarded as an admission that the past consideration was not gratuitous and which is evidence of the amount of the reasonable remuneration on the faith of which the services were rendered (*k*). So

(e) B. & S. 393, 124 R.R. 610, cited on p. 8 above.

(f) *Debnarayan Dutt v. Chunilal Ghose* (1914) 41 Cal. 137; see *Jiban Krishna Mullick v. Nirupama Gupta* (1926) 53 Cal. 922, 925; and dist. *Krishna Lal Sadhu v. Pramila Bala Dasi* (1928) 55 Cal. 1315.

(g) *Areti Singarayya v. Areti Subhayya* (1924) 47 Mad. L.J. 517.

(h) *Rakhmabai v. Govind* (1904) 6 Bom. L. R. 421.

(i) *Sundararaja v. Lakshmiammal* (1914) 38 Mad. 788.

(j) (1615) Hob. 105; Smith L. C. 11th, Ed. 141.

(k) *Re Casey's Patents* (1892) 1 Ch. 104, 115, per Bowen, L.J.

in *Sindha v. Abraham* (l) the plaintiff rendered services to the defendant at his desire during his minority and continued those services at his request after his majority. This was held to be a good consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff, but it was admitted that if the services had not been rendered at the desire of the defendant the case would have fallen within sec. 25 of the Act.

"Or does or abstains from doing": Forbearance as consideration.—The essence of consideration is that the promisee takes on himself some kind of burden, or "detriment," as the English authorities call it. Where the consideration is a present performance and not a promise, the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility or in foregoing the exercise of a legal right. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. If at the defendant's request the plaintiff promises to abstain from exercising a right the contract is formed by reciprocal promises under sub-section (f). But if the plaintiff makes no promise but merely abstains from exercising his right such abstinence is good consideration (m) and is an acceptance of defendant's proposal—sec. 8. And where the defendant has made an offer to pay in consideration of forbearance, with some other alternative offer, the plaintiff's forbearing to sue in fact is a sufficient acceptance of the first alternative (n). If it is asked at what moment the proposal conveyed by such a request becomes a promise the answer is that it does so whenever the other party has in fact forborne his rights for a time which the Court considers long enough to amount to a reasonable compliance with the request. It will be found that many cases in which forbearance to sue is said to be consideration for a promise are really cases of reciprocal promises. In such cases the consideration is not the forbearance but an express promise not to sue or a promise implied from such forbearance (o).

Compromise.—The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration. This topic is dealt under sec. 25 of the Act.

"Or promises to do or to abstain from doing something": Mutual promises.—These words, supplemented by sub-secs. (e) and (f), convey in a somewhat indirect and inconspicuous manner the extremely

(l) (1895) 20 Bom. 755: cf. (1918) 20 Bom. L. R. 441.
(m) See *Alliance Bank v. Broom* (1864) 2 Dr. & S. 289 as a good example of this class. See also *Fanindra Narain v. Kacheman Bibi* (1918)

45 Cal. 774.
(n) *Wilby v. Elgee* (1875) L. R. 10 C. P. 497.
(o) For example, *Amin Chand v. Guni* (1929) 119 I. C. 766, ('29) A. L. 466.

S. 2 important proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. In this case neither promise is of any value by itself, but each of them derives its value from the exchange which makes them both binding.

A consideration which consists in performance is said to be executed. If and so far as it consists in promise, it is said to be executory. It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce.

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. But for the counter-promise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act.

An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request. So a promise of forbearance may be a good executory consideration.

"Such act or abstinence or promise is called a consideration for the promise": Further requirements.—It will be observed that, according to the terms of the definition, it is only required that something should have been done, forborne, or promised at the request of the promisor.

One would expect the Act to say somewhere that, in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable"; that is to say, something which not only the parties regard, but the law can regard as having some value. This is a fundamental rule in the Common Law. Had the Act abrogated it, the consequences would have been extensive; but it seems to be beyond doubt that such was not the intention and that the silence of the Act cannot be taken as altering the English law as it stood settled in British India. The principle may be broadly expressed thus: The law will not enforce a promise given for nothing and if it is apparent to the Court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little), then there is no foundation for the promise, and we say either that there is not any consideration or that there is an "unreal consideration." In sec. 23 it is declared that certain kinds of consideration are not lawful. In sec. 25 agreements made without consideration are declared to be void. It is not anywhere stated in terms that consideration is not lawful, or otherwise not sufficient if it is not "good" or "valuable" in the sense which those terms bear in English law.

Sub-ss. (e) to (j) : Agreement and Contract.—By sub-sec. (e) an agreement is either a promise or a group of promises (*p*), and, therefore, it would seem that an executed consideration is not reckoned as part of the agreement. This is not according to the current use of language, which treats an agreement as an act of both parties, whether a legal obligation is incurred by one or both of them. A unilateral contract is not the less a transaction between two parties to which both must contribute something. Sub-sec. (f) agrees with common usage.

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The distinction between “agreement” and “contract” made by sub-sec. (h) is apparently original; it is convenient, and has been adopted by some English writers. The conditions required for an agreement being enforceable by law are contained in Chapter II of the Act, ss. 10 *et seq.* where it will also be seen that the absence of any such condition makes an agreement void, and certain defects will make a contract voidable. The duties of parties to a contract are set forth in Chapter IV of the Act. The manner in which contracts are, if necessary, enforced belongs to civil procedure.

CHAPTER I.

Of the Communication, Acceptance and Revocation of Proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication, acceptance and revocation of proposals.

What is communication?—It is matter of the commonest experience that the communication of intentions may be effectually made in many other ways besides written, spoken, or signalled words. For example, delivery of goods by their owner to a man who has offered to buy them for a certain price will be understood by every one, unless there be some indication to the contrary to signify acceptance of that offer. No words are needed, again, to explain the intent with which a man steps into a ferry-boat or a tramcar, or drops a coin into an automatic machine. It is also possible for parties to hold communication by means of pre-arranged signs not being any form of cipher or secret writing, and not having in themselves any commonly understood meaning. This does not often occur in matters of business. Means of communication which a man has prescribed or authorized

(p) See *Abaji v. Trimbak Municipality* (1903) 28 Bom. 66, at p. 72.

S. 3 are generally taken as against him to be sufficient. A mere mental act of assent will not be treated as a communication (q).

Communication of special conditions.—In recent times there has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated. This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions. English authorities have established that it is a question of fact whether the person taking the ticket had (or with ordinary intelligence would have) notice of the conditions, or at any rate that the other party was minded to contract only on special conditions to be ascertained from the ticket. In either of these cases his acceptance of the document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of a more or less usual kind (r). But he is not liable if the ticket is so printed or delivered to him in such a state, as not to give reasonable notice on the face of it that it does embody some special conditions (s).

So far as we know, there is only one Indian case bearing directly on the subject. The plaintiff in that case (t) purchased of the defendant company a ticket by steamer, which was in the French language. Towards the top of the ticket were words to the effect that "this ticket in order to be available, must be signed by the passenger to whom it is delivered." At the foot of the ticket there was an intimation in red letters that the ticket was issued subject to the conditions printed on the back. One of those conditions was that the company incurred no liability for any damage which the luggage might sustain. The vessel was wrecked by the fault of the company's servants, and the plaintiff's baggage was lost. The plaintiff sued the defendant company for damages. The ticket was not signed by him,

(q) *Brogden v. Metrop. R. Co.* (1877) 2 App. Ca. at pp. 691, 692, per Lord Blackburn.

(r) See *Gibaud v. G. E. R. Co.* [1920] 3 K. B. 689.

(s) In *Henderson v. Stevenson* (1875) L. R. 2 Sc. & D. 470, where an endorsement on a steamboat ticket was not referred to on its face, and *Richardson v. Rowntree* [1894] A. C. 217, where the ticket was folded up so that no writing was visible without opening it, a finding of fact that the passenger knew nothing of any

conditions was supported. See *Madras Railway Co. v. Govinda Rau* (1898) 21 Mad. 172, 174, and for a general summary of the law *Hood v. Anchor Line* [1918] A. C. 837, where both the contract and a notice on the envelope enclosing it pointedly called attention to the conditions. Inability to read is no excuse: *Thompson v. L. M. & S. R. Co.* [1930] 1 K. B. 41, C. A.

(t) *Mackillican v. Compagnie des Messageries Maritimes de France* (1880) 6 C. W. N. 227.

and he stated that he did not understand the French language, and that the conditions of the ticket had not been explained to him. It was held that the plaintiff had reasonable notice of the conditions, and that it was his own fault if he did not make himself acquainted with them. As to the absence of the plaintiff's signature, it was held that the clause requiring the passenger's signature was inserted for the benefit of the company, and that they might waive it if they thought fit. The decision seems also to imply that a French company is entitled to assume that persons taking first-class passages either know French enough to read their tickets or, if they do not ask for a translation at the time, are willing to accept the contents without inquiry. This seems reasonable enough in the particular case.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Communication when complete.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post. The communication of the acceptance is complete,—

as against *A*, when the letter is posted;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram. The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

S. 4

Agreement between parties at a distance.—No difficulty arises on the first paragraph (u). Whether a proposal has or has not come to the knowledge of the person to whom it was made is purely a question of fact. The rest of the section is intended, as shown by the illustrations, to meet the questions raised by the formation of agreements between parties at a distance. It has done this, as regards acceptance by enacting (in combination with s. 5) that for a certain time—namely, while the acceptance is on its way—the receiver shall be bound and the sender not. The proposal becomes a promise before it is certain that there is any consideration for it. This can be regarded only as a deliberate and rather large departure, for reasons of convenience, from the common law rule which requires the promise and the consideration to be simultaneous. The case of an acceptance being “put in a course of transmission to” the proposer, but failing to reach him, is not expressly dealt with. It seems to result from the language of the second paragraph that the proposer must be deemed to have received the acceptance at the moment when it was despatched so as to be “out of the power of the acceptor,” and that accordingly it becomes a promise on which the acceptor can sue, unless, some further reason can be found why it should not. Where the agreement is to consist in mutual promises, a binding contract appears to be formed by a letter of acceptance despatched in the usual way, even if it does not arrive at all, unless the proposal was expressly made conditional on the actual receipt of an acceptance within a prescribed time, or in due course, or unless the acceptor sends a revocation as provided for by the latter part of the section and explained by illustration (c). This last qualification is probably a departure from the English law. Apart from the question of a possible revocation, the total result, on the words of the Act, is in accordance with the existing English authorities. When the proposal and acceptance are made by letters, the contract is made at the time when and the place where the letter of acceptance is posted (v).

English rules.—The rules as now settled in England are as follows:—

“A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn (w). In other words, the revocation of a proposal is effectual only if actually communicated before the despatch of an acceptance; and the time when the revocation was despatched is immaterial. But where an acceptance, without notice of the offer being

(u) Transactions conducted in a summary manner, as by telegraph, may raise doubt as to what, according to the usual course of business the communication implied. Such questions are really of construction—e.g., *Radha Kania Dass v.*

Baerlein Bros. (1929) 56 Cal. 118.
(v) *Kamisetti Subbiah v. Katha Venkataswamy* (1903) 27 Mad. 355, English authority, so far as it goes is to the same effect.

(w) *Lord Herschell in Henthorn v. Fraser* [1892] 2 Ch. 27, 31.

revoked, is despatched in due course by means of communication, such as the post, in general use and presumably within the contemplation of the parties, the acceptance is complete from the date of despatch, notwithstanding any delay or miscarriage in its arrival from causes not within the acceptor's control" (x).

A letter of acceptance misdirected by the acceptor's fault cannot be deemed to have been effectually put in a course of transmission to the proposer (y).

Revocation arriving before acceptance.—One point remains unsettled in England. It has never been decided whether a letter of acceptance having been despatched by post, a telegram revoking the acceptance and arriving before the letter is operative or not. In British India, however, such a revocation is made valid by the express terms of secs. 4 and 5 of the Act.

Statutory consents.—The validity of consents required by special statutory provisions and revocations thereof, is governed by the terms of the statute, and not by this or the following section (z).

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Revocation of offers.—It is implied in this section that the proposer of a contract cannot bind himself (unless by a distinct contract made for a distinct consideration) to keep his offer open for any definite time and that any words of promise to that effect can operate only for the benefit of the proposer and as a warning that an acceptance after the specified time

(x) *Henthorn v. Fraser*, note (w) above.
(y) *Townsend's Case* (1871) L. R. 13 Eq. 148.

(z) *Lingo Ravji Kulkarni v. Secretary of State* (1928) 30 Bom. L. R. 570.

S. 5 will be too late (s. 6, sub-s. 2). Such is undoubtedly the rule of the Common Law. The reason is that an undertaking to keep the offer open for a certain time is a promise without consideration, and such a promise is unenforceable. *A* gives an undertaking to *B* to guarantee, for twelve months, the due payment of *M*'s bills, which may be discounted by *B* at *A*'s request. This is not a binding promise, but a standing proposal which becomes a promise or series of promises as and when *B* discounts bills on the faith of it. *A* may revoke it at any time subject to his obligations as to any bills already discounted. "The promise"—or rather offer—"to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend" (a). *Z* offers to take *A*'s house on certain terms, an answer to be given within six weeks. *A* within that time writes *Z* a letter purporting to accept, but in fact containing a material variation of the terms (see s. 7, sub-s. 1, below); *Z* then withdraws his offer; *A* writes again, still within the six weeks, correcting the error in his first letter and accepting the terms originally proposed by *Z*. No contract is formed between *Z* and *A*, since *A*'s first acceptance was insufficient, and the proposal was no longer open at the date of the second (b). A statutory power to make rules for the conduct of departmental business will, however, justify a local Government in prescribing among the conditions of tenders for public works, that a tender shall not be withdrawn before acceptance or refusal (c).

Sale by Auction, etc.—The liberty of revoking an offer before acceptance is well shown in the case of a sale by auction. Here the owner of each lot put up for sale makes the auctioneer his agent to invite offers for it, and "every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." Hence a bidder may withdraw his bid at any moment before the fall of the hammer (d).

The English rule that a bid may be withdrawn at any time before the fall of the hammer is followed in British India (e).

Standing offers.—A writing whereby *A* agrees to supply coal to *B* at certain prices and up to a stated quantity, or in any quantity which may be required for a period of twelve months, is not a contract unless *B* binds himself to take some certain quantity, but a mere continuing offer which may be accepted by *B*, from time to time by ordering goods upon the terms of the offer. In such a case, each order given by *B* is an acceptance of the offer; and *A* can withdraw the offer, or, to use the phraseology of the Act,

(a) *Offord v. Davies* (1862) 12 C. B. N. S. 748. See *Stevenson v. McLean* (1880) 5 Q.B.D. 346, 351.
(b) *Roulledge v. Grant* (1828) 4 Bing. 653, 29 R. R. 672.

(c) *Secretary of State v. Bhaskar Krishnaji* (1925) 49 Bom. 759.
(d) *Payne v. Cave* (1789) 3 T. R. 148.
(e) *Agra Bank v. Hamlin* (1890) 14 Mad. 235.

revoke the proposal, at any time before its acceptance by an order from B (f). The same principle was affirmed by the Judicial Committee on an appeal from the Province of Quebec, where French-Canadian law, is in force. A printer covenanted to execute for the Government of the Province, during a term of eight years, the printing and binding of certain public documents on certain terms expressed in a schedule. In the course of the same year the Lieutenant-Governor cancelled the agreement. The printer sued the Crown by petition of right, and it was ultimately held, reversing the judgment below, that he had no ground of action (g).

Advertisements of rewards and other so-called "general offers" have also raised questions whether particular acts were proposals of a contract capable of being promises by acceptance or merely the invitation of proposals. This will be more conveniently dealt with under sec. 8.

6. A proposal is revoked—

Revocation how made. (1) by the communication of notice of revocation by the proposer to the other party ;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Notice of revocation.—Here sub-sec. 1 appears to make it a condition of revocation being effectual that it shall be communicated by the proposer or by his authority.

Lapse of time for Acceptance.—The rule laid down by sub-sec. 2 is now elementary. On the point of an acceptance after the expiration of a reasonable time being too late, there is one direct English authority, where it was held that a person who applied for shares in a company in June was not bound by an allotment made in November (h).

(f) *The Bengal Coal Co. v. Homes Wadia & Co.* (1899) 24 Bom. 97 ; *Joravia Mell Champalal v. Jeygopaladas Ghanshandas* (1922) 43 Mad. L. J. 132, 45 Mad. 799.

(g) *R. Demers* [1900] A. C. 103, 108. Followed in *Secretary of State v. Madho Ram* (1928) 10 Lah. 493.
(h) *Ramsgate Victoria Hotel Co. v. Montefiore* [1866] L. R. 1 Ex. 109.

Ss.
6, 7

Condition precedent to Acceptance.—As to sub-sec. 3, it is not very easy to see what a condition precedent to acceptance means. A man proposing a contract may request either a single act, or several acts, or a promise or set of promises, or both acts and promises, as the consideration for a promise which he offers. The other party may do something obviously inconsistent with performing some or one of the things requested. This amounts to a tacit refusal, and accordingly the proposal is at an end, and the parties can form a contract only by starting afresh. If the fact amounts to a refusal, there is no manifest reason for calling it failure to fulfil a condition precedent. Everything required on the acceptor's part to complete an acceptance would rather seem to be part of the acceptance itself.

Death or insanity of proposer.—The provision made by sub-sec. 4 is quite clear. The English law is different, for in English law it is understood that "the death of either party before acceptance causes an offer to lapse (i)" and there is no question of notice. Again in English law the supervening insanity of the proposer does not seem to operate as a revocation since the contract of a lunatic is only voidable and not void. If an offer is addressed to a man who dies without having accepted or refused it, his executors have no power to accept it either in England or in British India. For the proposer cannot be presumed to have intended to contract with a deceased person's estate. This is very different from the case of one who accepts a proposal without knowing that the proposer is dead.

Refusal.—The rejection of a proposal by the person to whom it is made is wholly distinct from revocation, and is not within this section. A counter-offer proposing different terms has the same effect as a merely negative refusal; it is no less a rejection of the original offer, and a party who, having made it, changes his mind, cannot treat the first offer as still open (j).

Acceptance must be absolute. **7.** In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated

(i) *Hindley's Case* (1896) 2 Ch. 121
C.A.

(j) *Hyde v. Wrench* (1840) 3 Beav.

334; not otherwise in India
Nihal Chand v. Amar Nath
(1926) 8 Lah. L. J. 434.

to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance (k).

S. 7

Certainty of Acceptance.—The rule of the first sub-section is in itself obviously necessary, for words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything, and, therefore, can amount to nothing more than new proposal, or, as it is frequently called, a counter-offer. Sometimes additional words that seem at first sight to make the acceptance conditional are no more than the expression of what the law implies, as where in England an offer to sell land is accepted "subject to the title being approved by our solicitors." The reasonable meaning of this appears to be not to make a certain or uncertain solicitor's opinion final, but only to claim the purchaser's common right of investigating the title with professional assistance and refusing to complete if the title proves bad (l). Again, the offer of a new contract may be annexed to an absolute acceptance so that there is a concluded contract whether the new offer is accepted or not (m). But an acceptance on condition, coupled with an admission that the condition has been satisfied, may be in effect unconditional (n).

Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed (o), or some other act is done. There may be an express reservation in such words as these: "This agreement is made subject to the preparation and execution of a formal contract" (p). Or a proposal for insurance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here again there is no contract, but only a counter-offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against (q). Where there is no precise

(k) "These sections [7, 8 and 9] must be read without reference to the English law on the subject": Ashworth, J., *Gaddar Mal v. Tata Industrial Bank* (1927) 49 All. 674, 677.

(l) *Hussey v. Horne-Payne* (1879) 4 App. Ca. 311, 322, per Lord Cairns (followed, *Treacher & Co. v. Mahomedally* (1911) 35 Bom. 110).

(m) *Sir Mahomed Yusuf v. Secretary of State* (1920) 45 Bom. 8.

(n) *Roberts v. Security Co.* [1897] 1 Q. B. 111, C. A. see *The Equitable Fire and Accident Office v. The Ching Wo Hong* [1907] A. C. 96, 101.

(o) *Chinnock v. Marchioness of Ely* (1865) 4 D. J. S. 638, 646.

(p) *Hatzfeldt-Wildenburg v. Alexander* (1912) 1 Ch. 284; *Rosdale v. Denny* (1921) 1 Ch. 57 C. A.

(q) *Canning v. Farquhar* (1886) 16 Q. B. Div. 727; see especially per Lindley, L. J., at p. 733.

- S. 7** clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form (r), or whether they should be subject to a new agreement the terms of which are not expressed in detail, and this must be determined by examination of the whole of a continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract (s). But where it appears that a complete contract was formed by unqualified acceptance of an offer at a certain date, subsequent negotiations will have no effect unless they amount to a new agreement (t).

In British India it has been laid down, in accordance with English law as well as with the terms of the Act, that an acceptance with a variation is no acceptance; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made (u). Thus where an offer was made for the purchase of certain goods which were to be ordered out from Europe, and acceptance "free Bombay Harbour and interest," being a term not contained in the offer, was held to be no acceptance within the meaning of this section. The English authorities have also been followed on the point that parties are free to provide that the agreement shall not be complete and operative until its terms are reduced into writing, or are embodied in a formal document, and that it is a question of interpretation whether they have done so or not. Where, however, there is no such stipulation express or implied, the mere circumstance that the parties intend to put the agreement into writing or in a formal instrument will not prevent the agreement from being enforced, assuming, of course, that an agreement otherwise complete and enforceable is proved (v). Where, however, the formalities are not of the parties' selection, so that nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of these formalities (w).

Manner of Acceptance [sub-s. 2.]—A proposal must be accepted according to its terms. Therefore, if the proposer chooses to require that goods shall be delivered at a particular place, he is not bound to accept

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| <p>(r) <i>Harichand Mancharam v. Govind Luxman Gokhale</i> (1922) 50 I. A. 25, 47 Bom. 335; <i>Currimbhoy & Co., Ltd. v. L. A. Creet</i> (1930) 60 I. A. 297, 60 Cal. 980, ('33) A. P.C. 29.</p> <p>(s) <i>Hussey v. Horne-Payne</i> (1879) 4 App. Cas. 311; <i>Aryodaya S. & W. Co. v. Javalprasad</i> (1903) 5 Bom. L. R. 909.</p> | <p>(t) <i>Pery v. Suffields, Ltd.</i> [1916] 2 Ch. 187 C. A.</p> <p>(u) <i>Haji Mahomed v. Spinner</i> (1900) 24 Bom. 510, 523.</p> <p>(v) <i>Whymper v. Buckle</i> (1879) 3 All. 469; citing <i>Brogden v. Metropolitan Railway Co.</i> (1887) 2 App. Ca. 666.</p> <p>(w) <i>Thota Venkatachellamsami v. Krishnasawmy</i> (1874) 8 M. H. C. 1.</p> |
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delivery tendered at any other place (x). It is not for the acceptor to say that some other mode of acceptance which is not according to the terms of the proposal will do as well.

Ss.
7, 8

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by performing conditions, or receiving consideration.

General Offers.—The terms of this section are very wide. In the absence of illustrations, their intended scope is not very clear. "Performance of the conditions of a proposal" seems to be nothing else than doing the act requested by the proposer as the consideration for the promise offered by him, as when a tradesman sends goods on receiving an order from a customer. The only previous definition of acceptance in the Act is that a proposal is said to be accepted when the person to whom it is made "signifies his assent thereto" [s. 2 (b)]. This has to be read with the provisions as to communication in secs. 4 and 7. The present section appears, in its first branch, to recognise the fact that in the cases in which the offeror invites acceptance by the doing of an act "it is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract" (y). The most obvious example is where a reward is publicly offered to any person, or to the first person, who will recover a lost object, procure certain evidence, or the like. Here the party claiming the reward has not to prove anything more than that he performed the conditions on which the reward was offered, which conditions may or may not include communication by him to the proposer. In the simple case of a reward proposed for something in which the proposer has an obvious interest, there is not likely to be any other question than what the terms were, and whether they have been satisfied by the claimant. There is some authority for construing the terms liberally in favour of a finder (z). In England an open letter of credit authorizing the addressee to draw on the issuer to a specified extent

(x) *Eliason v. Henshaw* (1819) Sup. Ct. U. S. 4 Wheaton, 225. A communication by post of any demand or offer generally authorises the post as a proper mode of conveying the answer, but a general authority to pay a sum due by remittance through the post will not authorise the unusual practice of enclosing considerable sums of coin or negotiable notes in a post letter;

Mitchell Henry v. Norwich Union Insurance Society [1918] 2 K. B. 67 C. A.

(y) Anson, *Law of Contract*, p. 25, 17th ed.

(z) Offer of reward to any one tracing a lost boy and bringing him home held to be earned by finding and prompt notification (facts insufficiently stated): *Har Bhajan Lal v. Har Charan Lal* (1925) 23 All. L. J. 655.

S. 8 and requesting "parties negotiating bills under it to endorse particulars," has been held to amount to a general invitation or request to advance money on the faith of such bills being accepted, and to constitute a contract with any one so advancing money while the credit remained open (a). It has been held, that when particular goods are advertised for sale by auction the auctioneer does not contract with any one who attends the sale, intending to purchase those goods, that they shall be actually put up for sale (b); and that an advertisement for tenders for goods to be sold is not a proposal capable of being a contract to sell to the highest bidder, but "a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt" (c). Where a commission agent sends his quotations or terms of business to other people it is merely an intimation on his part of his readiness to transact business with them on those terms (d). A second-hand bookseller's catalogue is not a series of offers, but only invitation of offers; for if the catalogue has the effect of proposing a sale of every book to the first person who paid or undertook to pay the marked price. the bookseller would be bound to decide at his peril, as between practically simultaneous applicants, whose acceptance was first in order of time, and this might involve obscure matters of both fact and law. Clearly the bookseller does not mean to tie his hands in this way, nor can any reasonable customer suppose that he does. Where the acceptance of a proposal consists of the performance of the condition of the proposal, the contract is made at the place where the condition is performed (e).

Acting on offer—when sufficient Acceptance.—The nature of the acceptance required in these cases was considered by the English Court of appeal in *Carlill v. Carbolic Smoke Ball Co.* (f). The defendant company, being the proprietor of the "carbolic smoke ball," a device for treating the nostrils and air passages with a kind of carbolic acid snuff, issued an advertisement offering £100 reward to any person who should contract influenza (or similar ailments as mentioned) after having used the ball as directed. It was also stated that £1,000 was deposited with a named bank, "showing our sincerity in the matter." The plaintiff bought one of the smoke balls by retail, did use it as directed, and caught influenza while she was still using it. Hawkins, J. (g), held in a considered judgment that she was entitled to recover £100 as on a contract by the company. The Court of Appeal confirmed that judgment.

(a) *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867) L. R. 2 Ch. 391.

(b) *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286.

(c) *Spencer v. Harding* (1870) L. R. 5 C. P. 561.

(d) *Devidutt v. Shriram* (1932) 56 Bom. 324, 34 Bom. L. R. 236, (32) A. B. 291.

(e) *Sitaram Marwari v. Thompson* (1905) 32 Cal. 884.

(f) [1893] 1 Q. B. 256.

(g) The facts were not disputed. See the report in the Court below, [1892] 2 Q. B. 484.

It was objected in this case that the plaintiff had not communicated his acceptance of the offer to the defendant company. But Bowen, L.J., said that notification of acceptance is required for the benefit of the person who makes the offer, and that he may dispense with notice to himself. When the proposal is made in consideration of some act to be done, dispensation of notice may be inferred from the nature and circumstances of the proposal (h).

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8, 9

Does an act done by a person in ignorance of the proposal amount to "performance of the conditions of the proposal" within the meaning of this section? According to the High Court of Allahabad it does not. The plaintiff in that case was in the defendant's service as a *muni*. The defendant's nephew absconded, and the plaintiff volunteered his services to search for the missing boy. In his absence the defendant issued hand-bills offering a reward of Rs. 501 to any one who might find out the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the hand-bills when he found out the boy. Held that the plaintiff was not entitled to the reward (i). The Court declined to follow the English case of *Williams v. Carwardine* (j) as an authority that if A offers a promise for an act, and B does the act in ignorance of the offer, B is nevertheless entitled to claim performance of the promise from A.

Acceptance by receiving consideration.—The second branch of the section as to "acceptance of any consideration," etc., is rather obscure. It is generally sound principle, no doubt, that what is offered on conditions must be taken as it is offered. The use of the word "reciprocal" is curious, for it hardly fits the most obvious class of cases, as where goods are sent on approval, and the receiver keeps them with the intention of buying them. Here the seller need not and commonly does not offer any promise, and there is therefore no question of a reciprocal promise as defined in the Act (s. 2 (f)). The section has been applied to the case of a bank's customer receiving notice, which he did not answer, of an increase in the rate of interest on overdrafts, and afterwards obtaining a further advance; held that he accepted a consideration offered by the bank within the terms of this section (k).

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

(h) Compare in the case of a contract of guarantee *McIver v. Richardson* (1813) 1 M. & S. 557 (communication necessary) with *Ranga Ram Thakar Das v. Raghbir Singh* (1928) 113 I. C. 780, ('28) A. L.

938 (communication not necessary).
(i) *Lalman Shukla v. Gauri Dutt* (1913) 11 All. L. J. 489.
(j) (1833) 4 B. & A. 621.
(k) *Gaddar Mal v. Tata Industrial Bank* (1927) 49 All. 674.

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Express and tacit promises.—This section assumes that both proposals and acceptances may take place without express words. An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. It must be distinguished from the promises frequently said in English books to be implied by law, which were fictions required by the old system of pleading to bring cases of “relations resembling those created by contract” (ss. 68-72, below) within the recognized forms of action and sometimes to give the plaintiff the choice of a better form of action.

A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Thus an agreement between partners to vary the terms of the partnership contract may “either be expressed or be implied from a uniform course of dealing” (s. 252, below, which reproduces well-settled English law). Again when a customer of a bank has not objected to a charge of compound interest in accordance with the usual course of business there is an implied promise (*l*). Where parties have acted on the terms of an informal document which has passed between them, but has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound by those terms (*m*).

CHAPTER II.

Of Contracts, Voidable Contracts and Void Agreements.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

What agreements are contracts,

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

The first paragraph of this section is developed and applied by the more specific provisions of several following sections, which will be considered as they occur.

(*l*) *Haridas Ranchordas v. Mercantile Bank of India* (1920) L.R. 47 I.A. 17; I.L.R. 44 Bom. 474.

(*m*) *Brogden v. Metropolitan Railway Co.* (1877) 2 App. Ca. 666.

Written contracts.—Where the contract has been reduced to writing the deed must be construed and given effect to as it stands, even if the result be that the document is found to embody a bargain intended by neither of the parties to it (n). But if a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. The document does not amount to real agreement between the parties and the other party cannot sue on it (o).

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As to contracts required to be in writing.—See sec. 25, sub-secs. 1 and 3, and sec. 28, Exception 2. See also Indian Companies Act VII of 1913, s. 9, as to memorandum of association, s. 19 as to articles of association, and sec. 88 as to contract by companies. In this connection may also be noted the provisions of the Transfer of Property Act which require a writing in the case of a sale (s. 54), of a mortgage (s. 59), lease (s. 107) and gift (s. 123), and the provisions of the Indian Trusts Act which require a trust to be created in writing (s. 5); but these are not cases of contract in the proper sense of the word. Acknowledgments to save the law of limitation are required to be in writing by sec. 19 of the Limitation Act XV of 1908. Submissions under the Arbitration Act IX of 1899 are similarly required to be in writing.

Variance between print and writing.—Print and other mechanical equivalents of handwriting are generally in the same position with regard to rules of evidence and construction. But where a contract is partly printed in a common form and partly written, the words added in writing are entitled, as Lord Ellenborough said in a judgment repeatedly approved (p), if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words; inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions. But the print is not to be discarded altogether, and the Court should discover the real contract of the parties from the printed as well as from the written words (q).

As to the law relating to Registration.—Sec. 17 of the Indian Registration Act XVI of 1908 specifies documents which require to be registered; and sec. 49 of the same Act provides that no document required by sec. 17 to be registered shall affect any immovable property, unless it has been registered in accordance with the provisions of that Act.

- (n) *Sunitabala Debi v. Manindra Chandra* (1930) 52 Cal. L.J. 435.
 (o) *Tyagaraja v. Vedathanni* (1936) 63 I. A. 126, 59 Mad. 446, ('36) A.P.C. 70.
 (p) *Robertson v. French* (1803) 4 East 130; approved in *H. L., Glynn*

v. Margetson [1893] A.C. 351-357; *Noorbhai v. Allabux* (1917) 19 Bom. L.R. 845.

- (q) *Paul Beier v. Chotalal Javerdas* (1906) 30 Bom. 1.

S. 11 ✓ 11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract.

This section deals with personal capacity in three distinct branches: (a) disqualification by infancy; (b) disqualification by insanity; (c) other special disqualifications by personal law.

"To Contract."—That is, to bind himself by promise. A minor who gives value, without promising any further performance, to a person competent to contract is entitled to sue him for the promised equivalent (7).

Infancy.—As to infancy, the terms of the Act as compared with the Common Law, were long a source of grave difficulty. By the common law an infant's contract is generally not void but voidable at his option; if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessities. The literal construction of the present section requires being of the age of majority according to one's personal law as a necessary element of contractual capacity. Since the Act as a whole purports to consolidate the English law of contracts, with only such alteration as local circumstances require, the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed; but the Judicial Committee in 1903 declared that the literal construction is correct, and suggested that it was intended to give effect to the rule of Hindu law on the subject (s).

Age of majority.—This is now regulated by the Indian Majority Act IX of 1875. Sec. 3 of the Act declares that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years.

"Law to which he is subject."—The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. Thus in *Kashiba v. Shripat* (t) a Hindu

(r) *Bhola Ram, &c. v. Bhagat Ram* (1926) 8 Lah. L.J. 539.

(s) *Mohori Bibee v. Dhurmodas Ghose* (1903) 30 Cal. 539; L.R. 30 I.A. 114; followed, *Mir Sarwarjan v. Fakharuddin Mahomed* (1912) 39

Cal. 232; *Ma Hnit v. Hashim* (1920) 22 Bom. L.R. 531 [P.C.].

(t) (1894) 19 Bom. 697. See also *Rohilkhand and Kumaun Bank Ltd. v. Row* (1885) 7 All. 490.

widow above the age of sixteen and under the age of eighteen years, whose husband had his domicile in British India, executed a bond in Kolhapur (outside British India), where she was then residing. The question arose whether her liability on the bond was to be governed by the law of Kolhapur (*lex loci contractus*), or by the law of British India (law of her domicile). According to the law obtaining in Kolhapur, she would have been liable on the bond, as the age of majority according to that law is sixteen years, and the bond was executed by her after she completed her sixteenth year. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the Contract Act, being the law of her domicile, and that under the Act she was not liable on the bond.

Minor's agreement.—If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: *No person is competent to contract who is not of the age of majority according to the law to which he is subject; in other words, a minor is not competent to contract.* This proposition is capable of two constructions: either that a minor is absolutely incompetent to contract, in which case his agreement is void, or that he is incompetent to contract only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner (u); if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract can be ratified by the minor on his attaining majority. The former current of Indian decisions was that, as under the English law, a minor's contract is only voidable at his option. But in 1903, the Judicial Committee ruled that "the Act makes it essential that all contracting parties should be competent to contract," and especially provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It was accordingly held that a mortgage made by a minor is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under secs. 64 and 65 on a decree being made declaring the mortgage invalid. This decision leaves no doubt that a mortgage by a minor being void, no decree can be passed on the mortgage either against the mortgagor personally or against the mortgaged property.

If the guardian of a minor has made a contract for the minor which is within his competence and which is binding on the minor and for the minor's

(u) *Suraj Narain v. Sukhu Ahir* (1928) 51 All. 164; cf. *Bindeshri*

Bakhsh Singh v. Chandika Prasad (1926) 49 All. 137.

- S. 11 benefit there is a valid contract which the minor can enforce (v). See note on *Khwaja Muhammad's* case at page 9. A guardian can make an enforceable contract of marriage for a minor (w); but a Mahomedan widow is not competent to make a partnership contract for her minor children (x).

Fraudulent Representation.—The Privy Council while holding in *Mohori Bibee's* case that a minor's contract is void referred to the Court's discretion under secs. 38 and 41 of the Specific Relief Act to award compensation. Their Lordships held that the Calcutta High Court had correctly exercised their discretion in refusing compensation as the money had been advanced with full knowledge of the infancy of the borrower. This pronouncement has been held to justify the award of compensation when the cancellation of an instrument has been adjudged at the instance of a minor (y). If a mortgage (z) or a sale (a) of his property by a minor is set aside the Court may award compensation if satisfied that the minor had made a fraudulent representation as to his age.

It is well established in English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant" (b). In *R. Leslie, Ltd. v. Sheill* (c) the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. The principle of that decision was applied by the Judicial Committee to a case from the Straits Settlements where the loan was secured by a mortgage of the minor's property (d). The Lahore High Court has, however, held that as the contract is wiped out the *status quo ante* should be restored and that the Court has jurisdiction to adjust the equities between the parties and to order a fraudulent minor to restore the benefit he has received or to make compensation for it (e).

Estoppel.—There were many conflicting decisions as to whether a minor can be estopped by a false representation as to his age. The question is now settled by the case of *Sadiq Ali Khan v. Jai Kishore* (f) where the

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| <p>(v) <i>Rose Fernandes v. Joseph Gonsalves</i> (1924) 48 Bom. 673.</p> <p>(w) 48 Bom. 673, <i>supra</i>.</p> <p>(x) <i>A. Khorajsway v. O. Acha</i> (1928) 6 Rang. 198.</p> <p>(y) See <i>Dattaram v. Vinayak</i> (1903) 28 Bom. 181, at p. 190.</p> <p>(z) <i>Kamla Prasad v. Sheo Gopal Lal</i> (1904) 26 All. 342; <i>Vaikuntarama v. Authimoolam</i> (1915) 38 Mad. 1071.</p> <p>(a) <i>Muhammad Said v. Bishmbhar Nath</i> (1923) 45 All. 645.</p> | <p>(b) <i>Jennings v. Rundall</i> (1799) 8 T.R. 335.</p> <p>(c) [1914] 3 K.B. 607.</p> <p>(d) <i>Mahomed Syedol Ariffin v. Yesh Ooi Gark</i> (1916) 43 I.A. 256, pp. 263-64; 21 C.W.N. 257. See <i>Radha Shiam v. Behari Lal</i> (1918) 40 All. 558, 559-560.</p> <p>(e) <i>Khan Gul v. Lakha Singh</i> (1928) 9 Lah. 701.</p> <p>(f) (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A.P.C. 152; <i>Khan Gul v. Lakha Singh</i> (1928) 9 Lah. 701.</p> |
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Privy Council observed that a deed executed by a minor is a nullity and incapable of founding a plea of estoppel. The principle underlying the decision is that there can be no estoppel against a statute. The Bombay High Court has followed the Privy Council ruling and reversed its former course of decisions (g). In a Calcutta case (h) the Court said: "It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws, such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under sec. 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract." The High Court of Allahabad has held that a minor who procures a loan by falsely representing that he is of full age is not estopped from pleading his minority in a suit upon a promissory note passed by him (i). In a Madras case (j) Sadasivva Ayyar, J., took the same view as the Allahabad High Court.

Mortgages and sales in favour of minors.—A person incompetent to contract may yet accept a benefit and be a transferee and so although a sale or mortgage of his property by a minor is void, a duly executed transfer by way of sale (k) or mortgage (l) in favour of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. A minor, therefore, in whose favour a deed of sale is executed is competent to sue for possession of the property conveyed thereby (m). And it has been held by a Full Bench of the Madras High Court that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf (n).

Ratification.—As a minor's agreement is void there can be no question of its being ratified. In a Madras case (o) a person gave a promissory note in satisfaction of one executed by him when a minor for money then borrowed.

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| (g) <i>Gadigeppa v. Balangowda</i> (1931) 55 Bom. 741. | <i>Koeri v. Baikuntha Karmaker</i> (1919) 4 Pat. L.J. 682; <i>Zafar Ahsan v. Zubaida Khatun</i> (1929) 27 All. L.J. 1114. |
| (h) <i>Golam Abidin v. Hem Chandra</i> (1916) 20 C.W.N. 418. | |
| (i) <i>Kanhaya Lal v. Girdhari Lal</i> (1912) 9 All. L.J. 103. | (m) 38 All. 62, <i>supra</i> ; 37 Mad. 390, <i>supra</i> . |
| (j) <i>Vaikuntarama v. Authimoolam</i> (1915) 38 Mad. 1071. | (n) <i>Raghava Chariar v. Srinivasa</i> (1917) 40 Mad. 308; <i>Hari Mohan v. Mohini Mohan</i> (1917) 22 C.W.N. 130. |
| (k) <i>Munni Koer v. Madan Gopal</i> (1916) 38 All. 62; <i>Munia v. Perumal</i> (1911) 37 Mad. 390. | |
| (l) <i>Raghava Chariar v. Srinivasa</i> (1917) 40 Mad. 308 (F. B.); <i>Madhab</i> | (o) <i>Arumugan v. Duraisinga</i> (1914) 37 Mad. 38. |

- S. 11 The Court held that the obligee could not enforce it as it was void for want of consideration.

Specific Performance.—A minor's agreement being void cannot be specifically enforced. But a contract may be entered into on behalf of a minor by his guardian or by a manager of his estate. In that case if the contract is within the competence of the guardian or manager and for the benefit of the minor it may be specifically enforced by or against the minor. But if either of these two conditions is wanting the contract cannot be specifically enforced at all (p). Thus it has been held that a contract entered into by a certificated guardian of a minor with the sanction of the Court for the sale of property belonging to the minor, the contract being for the minor's benefit, may be enforced by either party to the contract (q). But a guardian of a minor has no power to bind the minor by a contract for the purchase of immovable property, and the minor therefore is not entitled to specific performance of the contract: so held by the Judicial Committee in *Mir Sarwarjan v. Fakharuddin Mahomed* (r).

Necessaries.—Sec. 68 provides for liability in respect of necessities supplied to a person *incapable of entering into a contract*. A minor is a person incapable of contracting within the meaning of that section (s), and, therefore, the provisions of that section apply to his case. It will be observed that the minor's property is liable for necessities, and no personal liability is incurred by him, as it may be under English law. Sec. 70 cannot be read so as to create any personal liability in such a case. Under English law the liability is not on the express promise, if any there be; the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied. Necessaries must be things which the minor actually needs; therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use; they will not be necessities if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not (t). Objects of mere luxury cannot be necessities, nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessities (u). See notes to sec. 68, below.

"Of sound mind."—See sec. 12 for the definition of soundness of mind. By English law a lunatic's contract is not void, but voidable at his option,

(p) *Ethwaria v. Chandra Nath* (1906)

10 C.W.N. 763; *Babu Ram v.*

Said-un-Nissa (1913) 35 All. 499.

(q) 35 All. 499, *supra*; *Innatunnessa v.*

Janaki Nath (1917) 22 C.W.N. 477.

(r) (1912) 39 Cal. 232; 39 I.A. 1.

(s) *Watkins v. Dhunnoo Baboo* (1881)

7 Cal. 140, 143.

(t) *Johnstone v. Marks* (1887) 19 Q.B.D. 509, followed in *Jagon Ram v. Mahadeo Prasad* (1909) 36 Cal. 768.

(u) The classical English authority is *Ryder v. Wombwell* (1868) L. R. 4 Ex. 32.

and this only if the other party had notice of his insanity at the time of making the contract (v). But, after the decision that this section makes a minor's agreement wholly void, it is clear that a person of unsound mind must in British India be held absolutely incompetent to contract. And it has in fact been so held in a Madras case (w).

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Persons otherwise "disqualified from contracting."—The capacity of a woman to contract is not affected by her marriage either under the Hindu or Mahomedan law. A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. It is not necessary to the validity of the contract that her husband should have consented to it. When she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act; and she may bind him by her contract, in certain circumstances (x), even without his authority, the law empowering her on the ground of necessity to pledge her husband's credit. Otherwise a married woman cannot bind her husband without his authority, but she is then liable on the contract to the extent of her *stridhanam* (separate property) (y). In the same way a married Mahomedan woman is not by reason of her marriage disqualified from entering into a contract.

Turning next to persons of other denominations, there are two Indian enactments that create the separate property of married women, and impliedly confer upon them, as an incident of such property, the capacity to contract in respect thereof. The one is the Indian Succession Act XXXIX of 1925, sec. 20, and the other the Married Women's Property Act III of 1874. Both these enactments apply to the whole of British India, but neither of them apply to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mahomedan, Buddhist, Sikh, or Jain religion (z). Sec. 20 of the Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that all married women to whose marriages the Act applied became absolute owners of all property vested in, or acquired by, them, and their husbands did not by their marriage acquire any interest in such property (a). The Married Women's Property Act

- (v) *Imperial Loan Co. v. Stone* (1892)
1 Q. B. 599, C. A., confirming
previous authorities.
- (w) *Machaima v. Usman Beari* (1907)
17 Mad. L. J. 78.
- (x) e.g., pressing necessity: *Pusi v. Mahadeo Prasad* (1880) 3 All.

122, at p. 124.

- (y) Per Cur. in *Nathubhai v. Jawher*
(1876) 1 Bom. 121.
- (z) See Act III of 1874, s. 2 and Act
XXXIX of 1925, s. 20.
- (a) See the preamble to Act III of 1874.

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enacted that the wages and earnings of any married woman acquired or gained by her in any employment, occupation, or trade carried on by her, and all money or other property acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed to be her separate property (s. 4). The Act also provides that a married woman may sue and may be sued in her own name in respect of her separate property (s. 7), and that a person entering into a contract with her with reference to such property may sue her, and to the extent of her separate property recover against her, as if she were unmarried (s. 8). By the usage and etiquette of his profession a barrister is debarred from suing for his fees. But a barrister enrolled as an advocate of the Allahabad High Court who can both plead and act and combines the function of a barrister and solicitor can make a valid contract for his fees which he can enforce by suit (b).

The disability of alien enemies to sue in our Courts without license is a matter of general public policy not coming under this head.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests (c).

What is a sound mind for the purposes of contracting.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind (d).

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Burden of proof.—The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of sound mind the burden of proving

(b) *Nihal Chand v. Dilawar* (1933) 55 All.

570, 143 I.C. 727, ('33) A.A. 417.

(c) As to evidence of unsound mind see *Ram Sundar Saha v. Raj*

Kumar Sen (1928) 55 Cal. 285.

(d) See for an elementary illustration the facts in *Jai Narain v. Mahabir Prasad* (1926) 2 Luck. 226.

that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the contract (e). Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract.

Contract in lucid interval.—The second paragraph of the section provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus, even a patient in a lunatic asylum may contract during lucid intervals (see illustration (a)).

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.
“ Consent ” defined.

Apparent and real consent.—If the section is to cover all kinds of contracts, the word “ thing ” must obviously be taken as widely as possible. We must understand by “ the same thing ” the whole contents of the agreement, whether it consists, wholly or in part, of delivery of material objects, or payment, or other executed acts or promises.

Students and young practitioners must be warned not to exaggerate the working importance of cases which are quoted and discussed for the very reason that they are exceptional. Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words ; and that effect must be determined, if necessary, by the Court according to the settled rules of interpretation. Whoever becomes a party to a written contract “ agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument,” whatever meaning he may attach to it in his own mind (f).

Ambiguity.—An apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are extremely rare. It usually turns out that there is no real ambiguity, for either (1) the terms have an ascertained sense by which the parties are bound whatever they may profess to have thought, or (2) the proposal was never accepted according to its terms, as when a broker employed to sell goods delivered to the intending purchaser and the intending

(e) *Tilok Chand v. Mahandu* (’33) A.L. 458.

(f) Per Lord Watson, *Stewart v. Kennedy* (1890) 15 App. Ca. 108,

123; *Sunitabala Debi v. Manindra Chandra* (1930) 52 Cal. L.J. 435 P.C.

S. 13 seller sale notes describing goods of different qualities (*g*). "The contract," said the Court, "must be on the one side to sell, and on the other side to accept, one and the same thing." No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake. Similarly if the addressee of a cipher or code message conveying a proposal misreads the proposal not unreasonably, and accepts it according to his own understanding, he cannot be held bound to the contract which the proposer intended. If the terms are really ambiguous, there is nothing in such a case which either party can enforce (*h*).

Fundamental error.—In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may have been given under a mistake, which the party is not precluded from showing, and which is so complete as to prevent the formation of any real agreement "upon the same thing." Such fundamental error may relate to the nature of the transaction, to the person dealt with, or to the subject-matter of the agreement.

As to the nature of the transaction.—A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled, not only to set it aside against the other party on the ground of any fraud or misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by any one. In one case the defendant had purported to endorse a bill of exchange which he was told was a guaranty. The plaintiff was a subsequent holder for value, and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action. But the Court held that his signature, not being intended as an endorsement of a bill of exchange, or as a signature to any negotiable instrument at all, was wholly inoperative, as much so as if the signature had been written on a blank piece of paper first, and a bill or note written on the other side afterwards (*i*).

Consent and estoppel.—The Indian Courts have followed English authority in holding that, in normal circumstances, a man is not allowed to deny that he consented to that which he has in fact done, or enabled to be done with his apparent authority. Thus when a person entrusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt

(*g*) *Thornton v. Kempster* (1814) 5 Taunt. 786.

(*h*) *Falck v. Williams* [1900] A. C.

176.

(*i*) *Foster v. Mackinnon* (1869) L. R. 4 C.P. 704.

the good faith of the transaction, it is presumed that the bond was drawn in accordance with the obligor's wishes and instructions (j).

Error as to the person of the other party.—There can be no real formation of an agreement by proposal and acceptance unless a proposal is accepted by the person, or one of a class or number of persons, to whom it is made. Similarly the acceptance must be directed to the proposer, or at least the acceptor must have so acted as to entitle the proposer to treat the acceptance as meant for him. The acceptance of an offer not directed to the acceptor may occur by accident, as where a man's successor in business receives an order addressed to his predecessor by a customer who does not know of the change, and executes it without explaining the facts. Here no contract is formed (k). But the buyer would be bound, as on a new contract if after notice he treated the sale as subsisting (l). Acceptance intended for a person other than the person actually making the offer might possibly happen by accident, but in the reported cases it has been the result of fraudulent personation. The proposer has obtained credit, in effect, by pretending to be some person of credit and substance known to the acceptor, or the agent of such a person. In *Cundy v. Lindsay* (m), one Blenkarn closely imitated the address of a known respectable firm of Blenkiron & Co., and wrote his signature so as to look like theirs. A dealer to whom he wrote ordering goods thought, as Blenkarn intended, that the order came from Blenkiron & Co., and sent the goods to the address given. It was held by the Court of Appeal and the House of Lords that, as the senders thought they were dealing with Blenkiron & Co., and knew nothing of Blenkarn, and had no intention of dealing with him, there was no contract, and Blenkarn acquired no property in the goods. Similarly, in a Punjab case, where A entered into a contract with B, a brother of C, on the representation of B that he was C himself, the Chief Court of the Punjab held that the case came within the section, and that there was no contract between A and B (n).

As to the subject-matter of the agreement.—It is quite possible for the parties to a contract to be under a common mistake of this kind. If the mistake is not common, it may happen, in very exceptional cases, that by reason of an ambiguous name, or the like, each party is mistaken as to the other's intention, and neither is estopped from showing his own intention (o). Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake, not common to both parties, only where it is induced by fraud or misrepresentation. We

(j) *Wahidunnessa v. Surgadass* (1879) 5 Cal. 39.

(k) *Boulton v. Jones* (1857) 2 H. & N. 564.

(l) See *Mitchell v. Lapage* (1816) Holt, N. P. 253.

(m) (1878) 3 App. Ca. 459.

(n) *Jaggannath v. Secretary of State* (1886) Punj. Rec. no. 21.

(o) *Falck v. Williams* [1900] A. C. 176.

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shall find (see below on s. 18) that wilful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances. If the mistake is common, it can seldom, if ever, be said that there was no consent. Thus if both parties agree to sell and to buy a horse not knowing that the horse is dead, the agreement fails not for want of consent but because the nature of the agreement implied that it referred to a living horse.

14. Consent is said to be free when it is not caused by—

- “Free consent” defined.
- (1) coercion, as defined in section 15, or
 - (2) undue influence, as defined in section 16, or
 - (3) fraud, as defined in section 17, or
 - (4) misrepresentation, as defined in section 18, or
 - (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Unfree consent.—Not only consent but free consent is declared by sec. 10 to be necessary to the complete validity of a contract. Where there is no consent or no real and certain object of consent there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully explained by the later sections referred to in the text.

15. “Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. *A* afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

Extent of "coercion" under the Act.—The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract, or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at common law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of Undue Influence. Detaining property is not duress.

Act forbidden by the Penal Code.—The words "act forbidden by the Indian Penal Code" make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency and in fear of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion," though the agreement may be void as opposed to public policy within the meaning of sec. 23 (p). It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent (q). So if a false charge of criminal trespass is brought against a person and he is coerced into agreeing to give half of his house to the complainant the agreement will not be enforced (r).

In a recent Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this section? Wallis, C. J., and Seshagiri Aiyar, J., answered the question in the affirmative, holding in effect that though a threat to commit suicide was not *punishable* under the Indian Penal Code, it must be deemed to be *forbidden*, as an *attempt* to commit suicide was punishable under the Code (s. 309). Oldfield, J., answered the question in the negative on the ground that the present section should be construed strictly, and that an act that was not punishable under the Penal Code could

(p) *Gobardhan Das v. Jai Kishen Das* (1900) 22 All. 224; *Masjidi v. Mussammatt Ayisha* (1882) Punj. Rec. no. 135.

(q) 22 All. p. 227, citing *Jones v.*

Merionethshire Building Society [1893] 1 Ch. 173.

(r) *Sanaullah v. Kalimullah* ('32) A.L. 446.

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not be said to be forbidden by that Code (s). This view seems to be correct. A penal code forbids only what it declares punishable.

Unlawful detaining of property.—A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section (t).

16. (1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other (u) and uses that position to obtain an unfair advantage over the other.

“Undue influence”
defined.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable (v), the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(s) *Amiraju v. Seshama* (1917) 41 Mad. 33.

(t) *Bengal Stone Co., Ltd. v. Joseph Hyam* (1918) 27 Cal. L. J. 78, 80-82. Detaining office books, etc., left in the hands of an outgoing agent may, of course, fall under the section: *Multhier Chettiar v. Karupan Chetti* (1927) 50 Mad. 786.

(u) This is an essential condition for the application of the section; no further question arises until it is satisfied. *Raghunath Prasad v.*

Sarju Prasad (1923) L. R. 51 I. A. 101, 3 Pat. 279; *Sanwal Das v. Kure Mal* (1927) 9 Lah. 470.

(v) This condition is essential for throwing the burden of proof on the person who was in a dominating position. Otherwise the actual use of that position must be proved as a fact: *Poosathurai v. Kannappa Chettiar* (1919) L. R. 47 A. I. 1, 43 Mad. 456; *Mahmud-un-Nissa v. Barketullah* (1926) 48 All. 667.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

Illustrations.

(a) *A*, having advanced money to his son *B*, during his minority, upon *B*'s coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.

(c) *A* being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Illustrations (a) and (b) of the present section are elementary law. Illustrations (c) and (d) are evidently intended to explain the application and the limits of para. 3.

The doctrine of undue influence in England.—“The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud” (*w*). It applies alike to acts of pure bounty by way of gift and to transactions in the form of contract which are clearly more advantageous to one party than to the other.

The English authorities are numerous, and many of them are complicated by questions on the one hand of actual fraud or on the other hand of breach of some special duty, such as that of an agent, which is independent of the state of mind of the parties. It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the text of the Act. The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle. It is obvious that the same power which can “dominate the will” of a weaker party is often also in a position to suppress the evidence which would be required to prove more constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such

(*w*) Lindley, L. J., in *Allcard v. Skinner* (1887) 36 Ch. Div. 145, 183.

- S. 16 cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is required to show that, in the absence of any of the relations which are generally accompanied by more or less control on one side and submission on the other, the consent of a contracting party was not free.

Sub-sec. 1 : Undue influence generally.—The first paragraph gives the elements of undue influence: a dominant position and the use of it to obtain an unfair advantage. The words “unfair advantage” must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. “The principle applies to every case where influence is acquired and abused, where confidence is reposed and ‘betrayed’ (x), or, as Sir Samuel Romilly expressed it in his celebrated argument in *Huguenin v. Baseley*, which has been made authoritative by repeated judicial approval (y), “to all the variety of relations in which dominion may be exercised by one person over another.” “As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties” (z). A plea of undue influence can only be raised by a party to the contract and not by a third party (a).

Sub-sec. 2 : Different forms of influence.—The second paragraph of the present section makes a division of the subject-matter on a different principle, according to the origin of the relation of dependence, continuing or transitory, which makes undue influence possible. Such a relation may arise (a) from a special authority or confidence committed to the donee, or (b) from the feebleness in body or mind of the donor. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable and prudent course is to insist on the other party taking independent advice (b). Following these principles, the High Court

(x) Lord Kingsdown in *Smith v. Kay* (1859) 7 H. L. C. 750, at p. 779.

This was a case of general control obtained by an older man over a younger one during his minority without any spiritual influence or other defined fiduciary relation.

(y) (1807) 14 Ves. 285; per Wright, J., [1893] 1 Ch. 752.

(z) Lindley, L. J., in *Allcard v. Skinner* (1887) 36 Ch. Div. at p. 183.

(a) *Kotumal v. Dur Mahomed* (’31) A.S. 78.

(b) In the case of a gift from client to solicitor it is an essential condition to the validity of the gift that the client should have competent independent advice: *Liles v. Terry* [1895] 2 Q.B. 679 C.A. The principle of *Liles v. Terry* was followed in *Rajah Papamma Row v. Sitaramayya* (1895) 5 Mad. L.J. 234.

of Allahabad set aside a gift of the whole of his property by a Hindu well advanced in years to his *guru*, or spiritual adviser, the only reason for the gift as disclosed by the deed being the donor's desire to secure benefits to his soul in the next world (c). Similarly, where a *cestui que trust* had no independent advice, it was held that a gift by him to the trustee of certain shares forming part of the trust funds was void, though in the same case a gift of shares which did not form part of the trust funds was upheld (d). The case of *Wajid Khan v. Ewaz Ali* (e), in which the Judicial Committee set aside a deed of gift executed by an old illiterate Mahomedan lady in favour of her confidential managing agent, comes under this head. The same principles apply to agreements for remuneration between an attorney and a client (f) and between a managing clerk in an attorney's office and a client (g). A parent stands in a fiduciary relation towards his child, and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by courts of equity, and the burden will be on the parent of third party claiming the benefit of showing that the child in entering into the transaction had independent advice, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made. Upon these principles the High Court of Madras refused to enforce against an adopted son a deed of trust of joint family property executed by him and his adoptive father whereby annuities were created in favour of certain relations of the father. The suit was brought by the relations after the father's death, but although the deed had been executed by the son after he had attained majority, it was dismissed as there was no evidence to show that the son had independent advice, or that he understood the nature of the transaction, or that his father's influence had ceased when the document was executed (h). Where an elder brother obtained from his younger brother, who was of feeble mind, a transfer of his half share in family properties for a small maintenance allowance, the Chief Court of Oudh set aside the transaction as being obtained by undue influence (i). But the presumption of undue influence does not apply to a gift by a mother to her daughter. If such a gift is sought to be set aside on the ground of undue influence, the burden lies upon those who seek to avoid it to establish domination on the part of the daughter and subjection of the mother (j). Age and capacity are important elements in determining whether consent was

(c) *Mannu Singh v. Umadat Pande* (1890) 12 All. 523.

(d) *Raghunath v. Varjivandas* (1906) 30 Bom. 578.

(e) (1891) 18 Cal. 545, L.R. 18 I.A. 144.

(f) *Shamaldhone Dubi v. Lakshimani Debi* (1908) 36 Cal. 493.

(g) *Harivalabhdas v. Bhai Jivanji* (1902) 26 Bom. 689.

(h) *Lakshmi Doss v. Roop Loll* (1907) 30 Mad. 169, on app. from 29 Mad. 1.

(i) *Tribhuvan v. Someshwar* ('31) A. O. 34.

(j) *Ismail Mussajee v. Hafiz Boo* (1906) 33 Cal. 773; L. R. 33 I. A. 86.

- S. 16** free in the absence of any confidential relation, but as against the presumption arising from the existence of such a relation they count for very little (*k*). Clause (b) of this paragraph seems to include the principle, established by a series of English decision, that "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction" (*l*). Infirmary of body or mind on the vendor's part will make it still more difficult to uphold any such contract. When the people who are nursing an elderly invalid get a transfer of practically the whole of his property in their favour without the knowledge and to the complete exclusion of his heir, it is for them to prove the *bona fides* of the transfer (*m*). There is no absolute rule as to the necessity or sufficiency of independent advice. It is not the only possible proof of a donor's competence and understanding; on the other hand, advice relied on to support the transaction must not only be independent, but "must be given with knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor" (*n*). Again the independent advice must have been given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction (*o*).

Mental distress.—"A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." The mere fact, therefore, that a submission was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence" (*p*). The pendency of the criminal proceedings did not put the plaintiff in a position to dominate the will of the defendant; but even if it did, there was no evidence that the plaintiff used that position to obtain an unfair advantage. "The law says that (1) not only the defendant must *have a dominant position*, but (2) he must use it" (*q*).

Both these elements were present in the case where the High Court of Madras refused to enforce an agreement entered into by a Hindu widow to adopt a boy to her husband, it appearing on evidence that the relatives

(*k*) *Rhodes v. Bate* L. R. 1 Ch. at p. 257.

(*l*) Per Kay, J., *Fry v. Lane* (1888) 4 Ch. D. 312, 322.

(*m*) *Maung Aung Bwin v. Maung Than Gyaung* ('33) A. R. 90.

(*n*) *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127, 135. See also *Ram Sumran Prasad v. Gobind*

Das (1926) 5 Pat. 646, 661.

(*o*) *Jean Mackenzie v. Royal Bank of Canada* ('34) A. P.C. 210.

(*p*) *Gobardhan Das v. Jai Kishen Das* (1900) 22 All. 224.

(*q*) *Amjadnessa Bibi v. Rahim Buksh* (1915) 42 Cal. 286. See also *Bara Estate, Ltd. v. Anup Chand* (1917) 2 Pat. L. J. 663, at p. 670.

of the boy obstructed the removal of her husband's corpse from the house unless she consented to the adoption (r).

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Proof of undue influence.—In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) whether it was a matter requiring a legal adviser; and (4) whether the intention of making the gift originated with the donor (s). All these are questions of fact (t).

Transaction with parda-nishin women.—The principles to be applied to transactions with parda-nishin women are not merely deductions from the law as to undue influence but have been said by the Privy Council to be founded upon the wider basis of equity and good conscience (u). The test laid down in recent cases by the Privy Council is that the disposition must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it (v). In the earliest decision of the Privy Council on the subject a Mahomedan lady sued her husband to recover the value of Company's paper alleging that the paper was her property and that she had endorsed and handed it over to him for collection of interest. The husband's defence was that he had purchased the paper from his wife. Their Lordships held, upon a review of the evidence, that although the wife had failed to prove affirmatively the precise case set up by her, nevertheless, as the wife was parda-nishin, the husband was bound to prove something more than mere endorsement and delivery and that he had failed to discharge the onus probandi, which was on him, that the sale had been *bona fide* and that he had given value for the paper (w). A few years later the Privy Council said with reference to deeds executed by parda-nishin women that it was necessary to see "that the party executing

(r) *Ranganayakamma v. Alwar Setti* (1889) 13 Mad. 214.

(s) Per Lord Macnaghten in *Mahomed Buksh v. Hosseini Bibi* (1888) 15 Cal. 684, at pp. 698-700; L. R. 15 I. A. 81, at pp. 92-93, see *Venkatrama Aiyar v. Krishnamal* (1927) 52 Mad. L. J. 20.

(t) There is really no law in e.g. such a case as *Narayana Doss Bala-krishna v. Buchraj Chordia Sowcar* (1927) 53 Mad. L. J. 842; though the facts may call for a careful judgment; another

such is *Parbhu v. Putlu* (1926) 1 Luok. 144.

(u) *Tara Kumari v. Chandra Mauleshwar* (1931) 58 I. A. 450, 11 Pat. 227.

(v) *Faridunnissa v. Mukhtar Ahmad* (1925) 52 I. A. 342, 47 All. 703; *Tara Kumari v. Chandra Mauleshwar*, *supra*; *Ramanama v. Viranna* (1931) 33 Bom. L.R. 960, ('31) A.P.C. 100.

(w) *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1867) 11 M. I. A. 551.

- S. 16 . them has been a free agent, and duly informed of what she was about" (b).

The law as to the burden of proof is summarised in a decision of the Judicial Committee (c): "In the first place, the lady was a *parda-nishin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to shew affirmatively and conclusively that the deed was not only executed, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."

Who is a *parda-nishin*.—The expression "*parda-nishin*" connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a *parda-nishin* woman that she lives in some degree of seclusion (d). Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda-nishin* woman (e).

Sub-sec. 3 : Rule of evidence.—The third paragraph of the present section does not lay down any rule of law but throws the burden of proving freedom of consent on a party who, being in a dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities, it "shocks the conscience." But until it has been established that the one party was "in a position to dominate the will of the other," no assistance on the issue of undue influence is available to the person attempting to avoid the contract. That issue, in other words, remains with the burden of proof on him (f).

"Unconscionable bargains."—Illustration (c) contemplates the case of a person already indebted to a money-lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable, but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is

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| (b) <i>Geresh Chunder v. Bhuggobully</i> (1870)
13 M. I. A. 419, 431; <i>Annoda Mohun Rai v. Bhuban Mohini Debi</i> (1901) 28 I.A. 71, 28 Cal. 546. | Bom. L. R. 146, 148. |
| (c) <i>Kali Baksh v. Ram Gopal</i> (1914) L. R. 41 I. A. 23, 28-29, 36 All. 81, 89. | (e) <i>Ismail Mussajee v. Hafiz Boo</i> (1906) 33 Cal. 773, 783, L. R. 33 I. A. 86; <i>Shaik Ismail v. Amirbibi</i> (1902) 4 Bom. L. R. 146. |
| (d) <i>Shuik Ismail v. Amirbibi</i> (1902) 4 | (f) <i>Gafur Mahomed v. Mahomed Sharif</i> (1932) 34 Bom. L. R. 1194, ('32) A. PC. 202. |

not of fraud, but of the unconscientious use of superior power. Inadequacy of consideration, though it will not of itself avoid a contract (s. 25, expl. 2 below), has great weight in this class of cases as evidence that the contract was not freely made. Relief in cases of unconscionable bargains is an old head of English equity. The general principles of equity in dealing with what are called "catching bargains" remain and the third clause of the section now before us is apparently intended to embody them. In fact, Indian High Courts have acted on these principles, both before and since the passing of the Contract Act, without any express authority of written law. Thus, where the interest was exorbitant, relief was granted by reducing the rate of interest in cases where the loan was made to an illiterate peasant (g), and to a Hindu, sixteen years old (h). Acting upon the same principles, the High Court of Bombay held that a covenant in a mortgage executed by an illiterate peasant in favour of a money-lender to sell the mortgaged property to the mortgagee at a gross undervalue in default of payment of interest was inequitable and oppressive and the mortgage was set aside to that extent (i). The High Court of Allahabad disallowed compound interest payable at 2 per cent. per mensem with monthly rests in the case of a bond executed by a spendthrift and a drunkard eighteen years old (j), and in another case reduced 25 per cent. compound interest to 12 per cent. simple where the debtor was old and illiterate and involved in litigation (k). Where a poor Hindu widow borrowed Rs. 1,500 from a money-lender at 100 per cent. per annum for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent. (l). The relief, however, has not been confined to money-lending transactions, and so far back as the year 1874 the Judicial Committee set aside a bond obtained by a powerful and wealthy banker from a young zamindar who had just attained his majority and had no independent advice, by threats of prolonging litigation commenced against him by other persons with the funds and assistance of the banker (m). The question whether a transaction should be set

(g) *Lalli v. Ram Prasad* (1886) 9 All. 74. See also the observations of the Judicial Committee in *Kamini v. Kaliprossunno Ghose* (1885) 12 Cal. 225, 238, 239; L.R. 12 I.A. 215, where the loan was made to a *parda-nishin* lady.

(h) *Mothoormohun Roy v. Soorendro Narain Deb* (1875) 1 Cal. 108.

(i) *Kedari Bin Ranu v. Atmarambhat* (1866) 3 B. H. C. A. C. 11.

(j) *Kirpa Ram v. Sami-ud-din* (1903) 25 All. 284.

(k) *Rukmina v. Mohib Ali Khan* ('34) A.A. 938.

(l) *Rannee Annapurni v. Swaminatha* (1910) 34 Mad. 7. See, further, as to the test of what is excessive: *Din Muhammad v. Badri Nath* (1929) 120 I.C. 417, ('30) A.L. 65. Exact definition is not possible: *Ramkishun Ram v. Bansi Singh* (1929) 116 I.C. 43, ('29) A.P. 340.

(m) *Chedambara Chetty v. Renja Krishna Muthu* (1874) 13 B. L. R. 509; L. R. 1 I. A. 241.

- S. 16 aside as being inequitable depends upon the circumstances existing at the time of the transaction, and not on subsequent events (n).

As between parties on an equal footing high interest, and even the holding of securities for a greater sum than has been actually advanced, will not suffice to make the Court hold a bargain unconscionable (o). Similarly, though the agreement be by a mortgagor for sale of his equity of redemption to the mortgagee upon onerous terms, the Court will not therefore refuse specific performance if the bargain is not unconscionable and there is no evidence to show that the mortgagee took an improper advantage of his position or of the mortgagor's difficulties (p).

On examining the cases relating to money-lending transactions cited in the preceding paragraph, it will be observed that in each of them the lender was "in a position to dominate the will" of the borrower, and the bargain was "unconscionable" within the meaning of cl. (3) of the present section. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower (q). The mere fact that the rate of interest is exorbitant is no ground for relief under this section (r), unless it be shown that the lender was in a position to dominate the will of the borrower. And it has been held by the highest tribunal that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of this section (s). The law on this subject, however, has been considerably altered since the enactment of the Usurious Loans Act, 1918.

Lapse of time and limitation.—Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence, unless he knew that he had the right, or, being a free agent at the time, deliberately determined not to inquire what his rights were or to act upon them (t). Lapse of time is not a bar in itself to such a relief. There must be conduct

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| <p>(n) <i>Ganga Baksh v. Jagat Bahadur Singh</i> (1895) 23 Cal. 15; L. R. 22 I. A. 153.</p> <p>(o) <i>Hari Lahu Patil v. Ramji Valad Pandu</i> (1904) 28 Bom. 371. As to the rate of interest, cp. <i>Lala Balla Mal v. Ahad Shah</i> (1919) 21 Bom. L. R. 558, where the Privy Council held 2 per cent. per mensem not to be unusual, also that compound interest was not necessarily unconscionable.</p> <p>(p) <i>Davis v. Maung Shwe Go</i> (1911) 38 Cal. 805; L. R. 38 I. A. 155.</p> <p>(q) <i>Poosathurai v. Kannappa Chettiar</i> (1919) 43 Mad. 456; L. R. 47</p> | <p>I. A. 1.</p> <p>(r) As to relief where a stipulation for the payment of interest amounts to a penalty, see s. 74 below and the notes thereon.</p> <p>(s) <i>Sundar Koer v. Rai Sham Krishen</i> (1907) 34 Cal. 150; L. R. 34 I. A. 9; <i>Chatring v. Whitchurch</i> (1907) 32 Bom. 208; <i>Debi Sahai v. Ganga Sahai</i> (1910) 32 All. 589; <i>Ramalingam Chettiar v. Subramania Chettiar</i> (1927) 50 Mad. 614; <i>Sitaram v. Ramrao</i> ('31) A. N. 91.</p> <p>(t) <i>Lakshmi Doss v. Roop Loll</i> (1907) 30 Mad. 169.</p> |
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amounting to confirmation or ratification of the transaction (u). If there be no such conduct, it is open to the party, though he may not sue to set aside the transaction within the period of limitation to plead undue influence as a defendant in a suit brought against him to enforce the transaction.

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17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

(u) *Allcard v. Skinner* (1887) 36 Ch. Div. 145, at pp. 181, 182, 186.

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Fraud in general.—Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. He need not have definite knowledge or belief that it is not true (v). Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where they occur, there is not a contract voidable on the ground of fraud, but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. Thus when *A* sold land to *B* who covenanted to accept title as it was, the fact that *A* had previously sold the land to *C* was held to be active concealment amounting to fraud (w). But there was in fact no consent for the covenant implied that *A* had some title (x).

Sub-secs. 3, 4, 5.—Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is either fraudulent or not fraudulent. If fraudulent it is always a cause for rescinding a contract induced by it; if not, it is a cause of rescission only under certain conditions, which the definitions of sec. 18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub-secs. 3, 4, and 5 are intended to cover these. With regard to a promise made without any intention of performing it (sub-s. 3), it may fairly be said that a promise, though it is not merely a representation of the promisor's intention to perform it, includes a representation to that effect. It is fraud to obtain property, or the use of it, under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose (y). "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purpose for which the money is wanted, even if there is nothing unlawful in the object for which the money is actually wanted and used (z). In particular, it is well settled in England that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract (a).

(v) This is well settled in England; *Evans v. Edmonds* (1853) 13 C.B. 777.

(w) *Akhtar Jahan Begum v. Hazari Lal* (1927) 25 All. L. J. 708.

(x) *Motivahoo v. Vinayak* (1888) 12 Bom. 1.

(y) See *Feret v. Hill* (1854) 15 C.B. 207.

(z) *Edgington v. Fitzmaurice* (1885) 29 Ch. Div. 459, 480, 483, per Bowen, L. J.

(a) *Clough v. L. & N. W. R. Co.* (1871) L. R. 7 Ex. 21, in Ex. Ch.; *Ex parte Whittaker* (1875) L.R. 10 Ch. at p. 449.

Acts and omissions specially declared to be fraudulent.—Sub-sec. 5 applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non-compliance with the law is expressly declared to be fraud. Thus by sec. 55 of the Transfer of Property Act (IV of 1882) the seller of immovable property is required to disclose to the buyer "any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover," and the buyer to disclose to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest," and "omission to make such disclosures . . . is fraudulent," and this, it seems, even if the omission be due merely to oversight (b). Similarly under sec. 55 (1) (c) the seller is bound to answer truthfully any requisition with regard to the income or rental of the property and if he gives information which is false to his knowledge, he commits fraud (c).

Mere non-disclosure.—There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts (d), but there is no general duty to disclose facts which are or might be equally within the knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There are at least two practical qualifications of this rule. First the suppression of part of the known facts may make the statement of the rest, though literally true so far as it goes, as misleading as an actual falsehood. In such a case the statement is really false in substance, and the wilful suppression which makes it so is fraudulent (e). Secondly, a duty to disclose particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist (f). Again, non-disclosure may be coupled with a representation that is fraudulent. A, knowing that an insolvent's decree is fully secured, suppresses the fact of the security and induces the Official Assignee to assign it to him at 20 per cent. of its face value by representing that the decree is practically unrealizable. A was under no duty to disclose the security. Nevertheless, his statement that the decree was

(b) Note that an agreement between vendor and purchaser that the vendor is not to be liable for defective title will not excuse active concealment: *Akhlar Jahan Begum v. Hazari Lal* (1927) 25 All. L.J. 708.

(c) *Premchand v. Ram Sahai* ('32) A. N. 148.

(d) e.g., Contract of fire insurance: *Imperial Pressing Co. v. British Crown Assurance Corporation* (1913) 41 Cal. 581. See also s. 143 below.

(e) *Peek v. Gurney* (1873) L.R. 6 H. L. 392, 403.

(f) *Jones v. Bowden* (1813) 4 Taunt. 847.

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18. "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;
"Misrepresentation" defined.
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him ;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Principles of English law as to misrepresentation.—The Common Law recognises a general duty not to make statements which are in fact untrue, with the intent that a person to whom they are made shall act upon them to the damage of the person so acting, and without any belief that they are true. The breach of this duty is the civil wrong known as fraud or deceit. But, if belief is there, it is not required by any general rule of law to be founded on any reasonable ground, though want of any reasonable ground may be evidence of want of belief (h). With regard to contracts, the general principle is that if one party has induced the other to enter into a contract by misrepresenting, though innocently, any material fact specially within his own knowledge, the party misled can avoid the contract. In certain classes of contracts, where the facts are specially within one party's knowledge, a positive duty of disclosure is added, and the contract is made voidable by mere passive failure to communicate a material fact. The principal examples of this special duty are to be found in the several branches of the contract of insurance (i), and in sales of immovable property. But there is no positive duty of disclosure between contracting parties where the facts are not by

(g) *Subramanian v. Official Assignee* ('31) A.M. 603.

Lords.

(h) *Derry v. Peek* (1889) 14 App. Ca. 337. Such is the law settled for England by the House of

(i) *Lakshmishankar v. Gresham Life Assurance Society* (1932) 34 Bom. L. R. 1295, ('32) A.B. 582.

their nature more accessible to one than to the other, though one party may have acquired information which he knows that the other has not (j).

Sub-sec. 1.—What is meant by “the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true”? This clause seems to mean that innocent misrepresentation does not give cause for avoiding a contract unless the representation is made without any reasonable ground. The High Court of Calcutta has held that an assertion cannot be said to be “warranted” for the present purpose where it is based upon mere hearsay (k). In an Allahabad case Sulaiman, C. J., said: “The principal difference between fraud and misrepresentation therefore is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor (l).”

We may refer to a Punjab case to illustrate the meaning of the expression “positive assertion.” A sells a mare to B. Before the sale A writes to B as follows, in answer to inquiries from B: “I think your queries would be satisfactorily answered by a friend if you have one in the station, and I shall feel more satisfied. All I can say is that the mare is thoroughly sound.” The letter is a “positive assertion” of soundness coupled with a recommendation to B to satisfy himself before purchasing; but it does not amount to a warranty (m).

Sub-sec. 2.—This sub-section was considered in a Bombay case (n) by Sargent, J.: “The second clause of sec. 18 is probably intended to meet all those cases which are called in the Courts of Equity, perhaps unfortunately so, cases of ‘constructive fraud,’ in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud or deceit.”

Sub-sec. 3.—This sub-section was applied in *The Oceanic Steam Navigation Co. v. Soonderdas Dhurumsey* (o). In that case the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs, which was described in the charter-party, and was represented to them, as being not more than 2,800 tonnage register. It turned out that the registered tonnage was 3,045 tons. The defendants refused to accept the ship in fulfilment of the charter-party, and it was held that they were entitled to avoid the charter-party by reason of the erroneous statement as to tonnage. As further

(j) *Laidlaw v. Organ*, 2 Wheat, 98.

For a recent example see *Turner v. Green* [1895] 2 Ch. 205.

(k) *Mohun Lall v. Sri Gungaji Cotton Mills Co.* (1899) 4 C. W. N. 369.

(l) *Naiz Ahmed v. Parsottam* (1931)

53 All. 374, (31) A. A. 154.

(m) *Currie v. Rennick* (1886) Punj. Rec. no. 41.

(n) *Oriental Bank Corporation v. Fleming* (1879) 3 Bom. 242, 267.

(o) (1890) 14 Bom. 241.

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illustrating the rule laid down in the present sub-section we might cite an earlier case, where it was held by the Allahabad Court that an agreement by the defendant to sell and deliver a boiler to the plaintiff at Rajghat was voidable at the option of the defendant, the plaintiff having represented (though innocently) to the defendant that there was a practicable road all the way, while, as a matter of fact, there was at one point a suspension bridge not capable of bearing the weight of the boiler (*p*).

Misrepresentation of fact or law.—It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance—especially if it came from a person better qualified to know—that the law is so and so. It seems probable in England, and there is no doubt here that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a *Kabuliyat* (counterpart of a lease) was represented by a zamindar's agent as a mere penalty clause, the Judicial Committee held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed (*q*).

19: When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Voidability of agreements without free consent.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

(*p*) *Johnson v. Crowe* (1874) 6 N.W. P. 350.

(*q*) *Pertab Chunder v. Mohendranath Purkhait* (1889) 17 Cal. 291,

L. R. 16 I.A. 233; *Tyagaraja v. Vedathanni* (1936) 59 Mad. 446, 63 I.A. 126, ('36) A. PC. 70.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) *A*, intending to deceive *B*, falsely represents that 500 maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that 500 maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*; *B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

Scope of the section.—The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable (r); the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark the limits within which the rule is applied. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be

(r) Fraud in the performance of a contract is no ground for rescission : *Jamsetji v. Hirjibhai* (1913) 17

Bom. L. R. 158, 169; *Fazal v. Mangaldas* (1921) 46 Bom. 489, 508.

S. 19 performed on his own part) or, in default thereof, damages for non-performance. If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly (s).

Exception: Means of discovering truth.—The exception is wider—we must suppose deliberately so—than the corresponding English authorities. In England the principle is that if a man makes a positive statement to another, intending it to be relied on, he must not complain that the other need not have relied upon it. “The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe” (t). The test is not whether the party might have inquired for himself but whether he did inquire and trust his own inquiries rather than the representation (u). No doubt there may be a question whether the party alleged to have misrepresented a fact really said, “I tell you it is so,” or only “I think you will find it so.” The possession of obvious means of knowledge may lead, in some cases, to a fair inference that those means were used and relied on. But still the real point to be considered is whether the party misled did put his trust in the representation made to him of which he complains, or in other information of his own. In the latter case the misrepresentation did not really cause his consent.

The ordinary diligence of which the Exception speaks may be taken to be such diligence as a prudent man would consider appropriate to the matter having regard to the importance of the transaction in itself and of the representation in question as affecting its results. A possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject-matter would not, it is conceived, be “means of discovering the truth with ordinary diligence.” Where a purchaser of rice stored up at a place to which he had an easy access refused to take delivery on the ground that the rice was of an inferior quality to that contracted for, it was held that he could not rescind the contract, for he could have discovered the inferiority of the quality by using “ordinary diligence” (v).

Explanation: as to “causing consent.”—A false representation, whether fraudulent or innocent, is merely irrelevant if it has not induced

(s) See the Specific Relief Act, s. 13.

(t) *Dyer v. Hargrave* (1805) 10 Ves. 505, 510.

(u) *Redgrave v. Hurd* (1881) 20 Ch.

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(v) *Shoshi Mohun Pal v. Nobo Kristo* (1878) 4 Cal. 801.

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the party to whom it was made to act upon it by entering into a contract or otherwise. He cannot complain of having been misled by a statement which did not lead him at all. Hence an attempt to deceive which has not in fact deceived the party can have no legal effect on the contract, not because it is not wrong in the eye of the law, but because there is no damage. This rule is applicable where a seller of specific goods purposely conceals a fault by some contrivance, in order that the buyer may not discover it if he inspects the goods, but the buyer does not in fact make any inspection (w). "Deceit which does not affect conduct cannot create liabilities" (x). "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act" (y). There is no rule of law that any particular kind of statement is necessarily material in some cases and immaterial in others. In general one man's money is as good as another's, and in a contract of loans the lender's personality is indifferent to the borrower; but where a money-lender who has acquired an evil reputation for hard dealing in his own name advertises and lends money in assumed names, it is a permissible inference of fact that the concealment of his identity was a fraud inducing the borrower to contract with him (z).

Rescission of voidable contracts.—As to the consequences of the rescission of voidable contracts, see sec. 64.

Specific performance.—As to the effect of fraud and misrepresentation on the rights of a party to claim or resist specific performance, see Specific Relief Act, I of 1877, secs. 26 (a), (b), (c), 28 (d), 31, and 35 (a).

19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Power to set aside contract induced by undue influence.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any

(w) *Horsfall v. Thomas* (1862) 1 H. & C. 90.

(x) *Anson*, p. 207, 17th ed.

(y) *Smith v. Chadwick* (1884) 9 App.

Ca. 187, 196 (Lord Blackburn).

(z) *Gordon v. Street* [1899] 2 Q. B. 641 C.A.

Ss. 19A, 20 benefit thereunder, upon such terms and conditions as to the Court (a) may seem just.

Illustrations.

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A, for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

This section appears to be intended to give express sanction to the constant practice of Indian as well as English Courts in cases of unconscionable money-lending, namely, to relieve the borrower against the oppressive terms of his contract, but subject to the repayment to the lender of the money actually advanced with reasonable interest. (See the illustrations.) The rate of interest allowed by the High Courts as reasonable has varied, according to circumstances, from 6 and 12 per cent. in Bengal to 24 per cent. in Bombay, Madras and the United Provinces (b).

The second paragraph of the section is virtually a reproduction of secs. 35 and 38 of the Specific Relief Act. The combined effect of those two sections is that a contract in writing may be rescinded at the suit of a party when (amongst other causes) it is voidable, but that the Court may require the party rescinding to make any compensation to the other which justice may require. It may be noted that under the present section the contract need not be in writing. See also sec. 64 below, which leaves no discretion to the Court in the matter of restitution.

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact (c).

(a) The refusal of terms suggested by the Court leaves this discretion free: *Sundar Rai v. Suraj Bali Rai* (1925) 47 All. 932.

(b) *Raja Mohkam Singh v. Raja Rup Singh* (1893) 15 All. 352, L. R. 20 I.A. 127 (where 20 per cent. was allowed); *Maneshar Bakhsh Singh v. Shadi Lal* (1909) 31 All. 386, L.R. 36 I.A. 96 (where 18 per cent. was allowed); *Poma*

Dongra v. William Gillespie (1907) 31 Bom. 348 (where 24 per cent. was allowed); *Ranee Annapurni v. Swaminatha* (1910) 34 Mad. 7 (where 24 per cent. was allowed).

(c) See *Harilal Dalsukhram Sahiba v. Mulchand* (1928) 52 Bom. 883. See also *Soorath Nath Banarjee v. Bharasankar Goswami* (1928) 33 C.W.N. 626.

Illustrations.

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(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void. [*Couturier v. Hastie* (1856) 5 H.L.C. 673].

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. [*Pothier, Contrat de Vente*, cited 5 H.L.C. 678.]

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void. [*Strickland v. Turner* (1852) 7 Ex. 208; *Cochrane v. Willis* (1865) L.R. 1 Ch. 58.]

Scope of the section.—The practical scope of this section is shown by the illustrations. It is not that the mistake has any special operation because it is a mistake, but that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement. Where the contract was for the sale of an object not existing, or which had ceased to exist according to the description by which it was contracted for, the result is still more easily apprehended if we say that there was nothing to buy and sell. In England partial destruction or loss of goods contracted for has the same effect (*d*).

The mistake must be as to an existing fact.—The mistake must be “as to a matter of fact *essential* to the agreement.” It is not enough that there was an error “as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration” (*e*). The circumstance, therefore, that at the date of a lease neither the lessor nor the lessee supposed that the Government assessment would ever be increased will not avail the lessor to avoid the lease if the assessment is subsequently enhanced (*f*). Similarly, a vendor is bound to deliver goods at the price set out in the contract of sale although the cost is increased by the subsequent imposition of an excise duty (*g*). Where a property agreed to be sold had been notified for acquisition under the Calcutta Improvement Act, and neither the vendor nor the purchaser was aware of the notification at the date of their agreement, the notification was held to constitute a

- (d) *Barrow Lane & Ballard v. Philip Phillips & Co.* [1929] 1 K.B. 574.
 (e) Per Blackburn, J., in *Kennedy v. Panama Mail Co.* (1867) L.R. 2 Q.B. 580, 588.

- (f) *Babshetti v. Venkataramana* (1879) 3 Bom. 154.
 (g) *Chin Guran & Co. v. Adamji Hajee Dawood & Co.* (1933) 11 Rang. 201, ('33) A.R. 79.

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matter of fact essential to the agreement within the meaning of this section and the agreement was declared void (*h*). Upon the same principles a compromise of a suit will be set aside if it was brought about under a mistake as to the subject-matter of the agreement (*i*). Not only a compromise (*j*), but an order of the Court made by consent (*k*), may be set aside if the arrangement was entered into under a one-sided mistake of counsel to which the other party, however innocently, contributed, or even otherwise if the mistake was such as to prevent any real agreement from being formed. *A fortiori* it is so in the case of the mistake being common to both parties (*l*).

Specific Performance.—As to the right of a party to resist specific performance of a contract on the ground of mistake, see Specific Relief Act, sec. 26 (a) and (b) and sec. 28 (a).

Rectification.—The Courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that the contract is inaccurately represented in the instrument. Thus in a Bombay case (*m*) the plaintiffs chartered a steamer from the defendants to sail from Jedda on “the 10th August, 1892 (fifteen days after the *Haj*),” in order to convey pilgrims returning to Bombay. The plaintiffs believed that “the 10th August, 1892,” corresponded with the fifteenth day after the *Haj*, but the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the *Haj*. On finding out the mistake the plaintiffs sued the defendants for rectification of the charter-party. It was held that the agreement was one for the 10th August, 1892; that the mistake was not mutual, but on the plaintiffs’ part only; and, therefore, that there could be no rectification. The Court further expressed its opinion that even if both the parties were under the mistake the Court would not rectify, but only cancel, the instrument, as the agreement was one for the 10th August, 1892, and that date was a matter materially inducing the agreement. See also Specific Relief Act, Ch. III., and the undermentioned case (*n*).

Compensation.—Note, in connection with the present section, the provision of sec. 65 that when an agreement is discovered to be void any person who has received any advantage under the agreement is bound to

(*h*) *Nursing Dass v. Chuttoo Lall* (1923) 50 Cal. 615.

(*i*) *Bibee Solomon v. Abdool Azeez* (1881) 6 Cal. 687, 706.

(*j*) *Hickman v. Berens* [1895] 2 Ch. 638.

(*k*) *Wilding v. Sanderson* [1897] 2 Ch. 534.

(*l*) *Huddersfield Banking Co. v. H. Lister & Son* [1895] 2 Ch. 273.

(*m*) *Haji Abdul Rahman Alarakhia v. The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561.

(*n*) *Madhavji v. Ramnath* (1906) 30 Bom. 457.

restore it, or to make compensation for it, to the person from whom he received it. A deficiency in quantity of land (or anything) sold which can be adequately dealt with by compensation does not come within this section at all (o).

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21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Effect of mistakes as to law.

Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation; the contract is not voidable.

Effect of mistake of law.—It is a citizen's business to know, by taking professional advice or otherwise, so much law as concerns him for the matters he is transacting. No other general rule is possible, as has often been observed, without enormous temptations to fraud. But it is to be observed that the existence of particular private rights is a matter of fact, though depending on rules of law, and for most civil purposes ignorance of civil rights—a man's ignorance that he is heir to such and such property, for instance—is ignorance of fact. A man's promise to buy that which, unknown to him, already belongs to him is not to be made binding by calling his error as to the ownership a mistake of law (p).

The section does not say that misrepresentation, at any rate, wilful misrepresentation, of matter of law, may not be ground for avoiding a contract under sec. 17 or sec. 18.

As to the second clause of the section, British Indian jurisprudence has adopted the rule of the Common Law that foreign law is a matter of fact, and must be proved or admitted as such, though the strictness of the rule has been somewhat relaxed by the Evidence Act (q).

The cases in which the present section has actually been applied have been fairly simple. An erroneous belief that a judgment-debtor is bound by law, to pay interest on the decretal amount, though no interest has been awarded by the decree, is a mistake of law, and a contract grounded on such belief is not voidable. Such a belief is not a belief as to a matter of fact essential to the agreement within the meaning of sec. 20: the Judicial Committee so held in *Seth Gokul Dass v. Murli* (r). If a mortgagee advances

(o) *U Pan v. Maung Po Tu* (1927)
100 I.C. 327, (27) A.R. 90.

(p) See *Cooper v. Phibbs*, L.R. 2 H.L.

170.

(q) Indian Evidence Act, s. 38.

(r) (1878) 3 Cal. 602; L.R. 5 I.A. 78.

After the establishment of the Federation of India
 this section applies in relation to Central Act
 made for a Federal State as it applies to
 Law in force in India. = Order. 1937.

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moneys under the erroneous belief that a prior unregistered mortgage deed would not take precedence even if registered subsequently, he cannot avoid the mortgage transaction (s).

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.
 Contract caused by mistake of one party as to matter of fact.

As an illustration of the rule, see *Haji Abdul Rahman Allarakhia v. The Bombay and Persia Steam Navigation Co. (t)*. See p. 60 above.

23. The consideration or object of an agreement is lawful, unless—
 What considerations and objects are lawful and what not.

it is forbidden by law ; or

is of such a nature that, if permitted, it would defeat the provisions of any law ; or

is fraudulent ; or

involves or implies injury to the person or property of another ; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment and *B*'s payment is the consideration for *A*'s promise and these are lawful considerations.

(s) *Jowand Singh v. Sawan Singh* ('33) A.L. 836. | (t) (1892) 16 Bom. 561.

(d) *A* promises to maintain *B*'s child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law (u).

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(k) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

Unlawful objects.—By sec. 10 an agreement is a contract (i.e., enforceable) only if it is made for a lawful consideration and with a lawful object. The present section declares what kinds of consideration and object are not lawful.

The word "object" in this section is not used in the same sense as "consideration," but is used as distinguished from "consideration," and means "purpose" or "design" (v).

(u) See *Mohan Lal v. Udai Narayan* (1910) 14 C. W.N. 1031, which is a parallel case.

(v) *Jaffer Meher Ali v. Budge Budge*

Jute Mills Co. (1906) 33 Cal. 702, 710; S.C. on appeal (1907) 34 Cal. 289.

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With regard to a consideration being forbidden by law, it is to be observed that, where the consideration is a promise, it may be forbidden in one of two distinct senses: (1) the promise may be something which it is unlawful to perform or (2) though the performance is not unlawful, the law for reasons of public policy will not enforce it. Thus agreements of wager, or in restraint of trade (apart from the limited sanction given to them) are not unlawful but no legal obligation attaches to them as the law will not enforce them.

An agreement may be rendered unlawful by its connection with a past as well as with a future unlawful transaction. Thus the giving of security for money purporting to be payable under an agreement whose purpose was unlawful is itself an unlawful object, even though it was not stipulated for by the original agreement (*w*).

With regard to the tendency of an agreement to "defeat the provisions of any law," these words must be taken as limited to defeating the intention which the Legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void merely because it tends to defeat some purpose ascribed to the Legislature by conjecture, or even appearing, as matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda not forming part of the enactment.

There is no department of the law in which the Courts have exercised larger powers of restraining individual freedom on grounds of general utility, and it is impossible to provide in terms for this discretion without laying down that all objects are unlawful which the Court regards as immoral or opposed to public policy. The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment. "Public policy" points to political, economical, or social grounds of objection, outside the common topics of morality, either to an act being done or to a promise to do it being enforced. Agreements or other acts may be contrary to the policy of the law without being morally disgraceful or exposed to any obvious moral censure.

English authorities on the subject of agreements being held unenforceable as running counter to positive legal prohibitions, to morality, or to public policy, are inapplicable to the circumstances of British India; because under the conditions of Indian manners and society such facts as are dealt with by certain classes of English decisions do not occur.

"Forbidden by law."—An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the Legislature or a principle of unwritten law. But in British India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punish-

(*w*) *Fisher v. Bridges* (1854) 3 E. & B. 342; *Geere v. Mare* (1863) 2 H. & C. 339.

able under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature. Parties are not, as a rule, so foolish as to commit themselves to agreements to do anything obviously illegal, or at any rate to bring them into Court; so the kind of question which arises in practice under this head is whether an act, or some part of a series of acts, agreed upon between parties does or does not contravene some legislative enactment or regulation made by lawful authority. Broadly speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it; but an act which is in itself harmless does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted.

Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to English law. The principles may be stated thus: "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreement made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; [but they] are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.*, the convenient collection of the revenue" (x).

The High Court of Bombay acted on these principles (y) where the question arose whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. Sec. 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sub-let the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sub-lease. It was contended on behalf of the defendant that the sub-lease was unlawful, as it was made without the permission of the Collector, and that the lessee was not therefore entitled to recover the amount claimed by him. But the contention was overruled as the Act did not forbid the transaction but merely imposed a condition for administrative purposes. Similarly

(x) See Pollock on Contract, pp. 361, 362.

(y) *Bhikanbhai v. Hiralal* (1900) 24 Bom. 622; followed, *Abdullah v. Allah Diya* (1927) 8 Lah. 310.

S. 23 where a license to cut grass was given by the Forest Department under the Forest Act, 1878, and one of the terms of the license was that the licensee should not assign his interest in the license without the permission of the Forest Officer, and a fine was prescribed for a breach of this condition, it was held that there being nothing in the Forest Act to make it obligatory upon the parties to observe the conditions of the license, the assignment would be binding upon the parties, though it was competent to the Forest Officer to revoke the license if he thought fit to do so (z). The above Acts, which are intended solely for the protection of revenue, must be distinguished from Abkari and Opium Acts, which have for their object the protection of the public as well as the revenue. Thus an agreement to sub-let a license to sell arrack issued under the Madras Abkari Act, 1886 (a), or a license to manufacture and sell country liquor granted under the N.-W.P. Excise Act, 1887 (b), or a license to sell opium issued under the Opium Act, 1878 (c), or a license to manufacture salt under the Bombay Salt Act, 1890 (d), without the permission of the Collector, is illegal and void, the sub-lease in each case without such permission being prohibited by statute, and no suit will lie to recover any money due or any sum deposited under such an agreement. A breach of a condition of a license granted under the Bombay Abkari Act, 1877, is penal under that Act. Therefore if the licensee enters into a partnership in breach of the terms of his license the agreement is void as forbidden by law (e).

In the case of contracts with public departments the breach of a condition is sometimes the subject of a pecuniary penalty. It does not follow that an agreement in breach of such a condition is immoral or opposed to public policy and therefore void. If the condition is imposed for administrative purposes such an agreement is valid and the consequences are limited to the specific penalty (f).

“Defeat the provisions of any law.”—The term “law” in this expression would seem to include any enactment or rule of law for the time being in force in British India. This branch of the subject may thus be considered under three heads according as the object or consideration of an agreement is such as would defeat (1) the provisions of any legislative

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| <p>(z) <i>Nazaralli v. Baba Miya</i> (1916) 40 Bom. 64.</p> <p>(a) <i>Thilhi Pakurudasu v. Bheemudu</i> (1902) 26 Mad. 430.</p> <p>(b) <i>Debi Prasad v. Rup Ram</i> (1888) 10 All. 577. As to what amounts to a sub-lease, see <i>Radhey Shivam v. Mewa Lal</i> (1929) 51 All. 506.</p> <p>(c) <i>Raghunath v. Nathu Hirji</i> (1894) 19</p> | <p>Bom. 626.</p> <p>(d) <i>Ismalji v. Raghunath</i> (1909) 33 Bom. 636; <i>Rabiabibi v. Gangadhar</i> (1922) 24 Bom. L.R. 111.</p> <p>(e) <i>Hormasji v. Pestanji</i> (1887) 12 Bom. 422.</p> <p>(f) <i>Bhikanbhai v. Hiralal</i> (1900) 24 Bom. 622 approving <i>Gangadhar v. Damodar</i> (1896) 21 Bom. 522.</p> |
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enactment, or (2) the rules of Hindu and Mahomedan law, or (3) other rules of law for the time being in force in British India.

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1. **Legislative enactments.**—An agreement to pay a cess which the law has declared to be illegal is void. So when the manager of a temple at Broach sued to establish a right to levy duty on cotton exported from Broach, the Court held that, even if the defendant had impliedly assented to pay, the agreement was unlawful as defeating the provisions of the Bombay Town Duties Act 19 of 1844, which had abolished all cesses not forming part of the land revenue (*h*). Again if a suspect who is ordered to furnish security for good behaviour under the Code of Criminal Procedure deposits the amount of the security bond with the surety, he will not be able to recover it by suit. This is because the effect of the agreement of deposit is to defeat the provisions of the Code by rendering the surety, a surety only in name (*i*). Similarly if a bail-bond is forfeited owing to the failure of the accused to appear, the surety cannot recover the amount from a person who agreed to indemnify him (*j*). But when an agreement is merely "void" as distinguished from "illegal" e.g. an agreement to give time to a judgment debtor without the sanction of the Court under the old Civil Procedure Code—either party on performing his part of the contract can enforce it as against the other party (*k*). Under sec. 4 of the Indian Companies Act, 1913, a trading partnership of more than 20 persons is illegal unless registered as a company. It has been held that a suit will not lie for the dissolution of such a partnership as it would defeat the provisions of the Companies Act (*l*). But the illegality of the partnership affords no reason why it should not be sued by an innocent person who is not aware of the illegality which affects the firm (*m*).

The policy of the Insolvent Debtors Act is to make the relief of the insolvent conditional on all his property being made available for rateable distribution among all his creditors. Therefore an agreement made by an insolvent to pay one creditor in full in consideration of his not opposing his discharge is void as inconsistent with the policy of the Act (*n*). An agreement by a debtor not to plead limitation is not a restraint of legal proceedings under s. 28 but it is void under s. 23 as it would defeat the provisions of the Limitation Act (*o*).

2. **Rules of Hindu and Mahomedan law.**—An agreement that would defeat the provisions of Hindu law is unlawful within the meaning

- (*h*) *Gosvami Shri Purushotamji Maharaj v. Robb* (1884) 8 Bom. 398.
- (*i*) *Fateh Singh v. Sanwal Singh* (1878) 1 All. 751.
- (*j*) *Bhupati Ch. Nandy v. Golam Ehibar Chowdry* (1919) 24 C.W.N. 368.
- (*k*) *Bank of Bengal v. Vyabhoy* (1891) 16 Bom. 618.
- (*l*) *Mewa Ram v. Ram Gopal* (1926) 48

- All. 735.
- (*m*) *Appa Dada Patil v. Ramkrishna Vasudeo Joshi* (1929) 53 Bom. 652.
- (*n*) *Naoroji v. Kazi Sidick Mirza* (1896) 20 Bom. 636.
- (*o*) *Ballapragada v. Thummana* (1917) 40 Mad. 701; *Jawahar Lal v. Mathura Prasad* ('34) A.A. 661 [F.B].

S. 23 of the present clause. A contract to give a son in adoption in consideration of an annual allowance to the natural parents is an instance of this class, and a suit will not lie to recover any allowance on such a contract, though the adoption may have been made (p).

A contract entered into by Hindus living in Assam, by which it is agreed that, in the event of the husband leaving the village in which the wife and her friends resided, the marriage shall become null and void, is contrary to the policy of Hindu law (q).

An agreement entered into before marriage between a Mahomedan wife and husband that the wife shall be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights (r). Upon the same principle an agreement between a Mahomedan husband and wife for a future separation is void, and the wife cannot on separation recover the maintenance allowance provided by the agreement (s).

3. Other rules of law in force in British India.—It is a well-established rule of law that, unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful so as to be enforceable under the provisions of sec. 375 of the Civil Procedure Code [now O. 23, r. 3] (t). Similarly, a receiver being an officer of the Court, the Court alone is to determine his remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority (u). A promise, therefore, to pay the salary of a receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor (v).

"Fraudulent."—Where the object of an agreement between A and B was to obtain a contract from the Commissariat Department for the benefit of both, which could not be obtained for both of them without practising fraud on the Department, it was held that the object of the agreement was fraudulent, and that the agreement was therefore void (w).

- (p) *Sitaram v. Harihur* (1910) 35 Bom. 169, at pp. 179, 180; *Raghubar Das Mahant v. Raja Natabar Singh* (1919) 4 Pat. L.J. 42; *Narayan v. Gopalrao* (1922) 24 Bom. L.R. 414, 46 Bom. 908.
 (q) *Sitaram v. Mussamut Aheeree Heerahnee* (1873) 11 B.L.R. 129, 134, 135.
 (r) *Abdul v. Husseni* (1904) 6 Bom. L.R. 728.
 (s) *Fatma v. Ali Mahomed* (1912) 37

- Bom. 280; contra *Muhammad Muni-ud-din v. Jamal Fatima* (1921) 43 All. 650; followed *Muhammad Ali Akbar v. Fatima Begum* (1929) 11 Lah. 85.
 (t) *Monmohini Guha v. Banga Chandra Das* (1903) 31 Cal. 357.
 (u) See Civil Procedure Code. O. 40, r. 1.
 (v) *Prokash Chandra v. Adlam* (1903) 30 Cal. 696.
 (w) *Sahib Ram v. Nagar Mal* (1884) Punj. Rec. no. 63.

But an agreement between *A* and *B* to purchase property at an auction sale jointly, and not to bid against each other, is perfectly lawful (*x*).

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"Injury to the person or property of another."—The general term "injury" means criminal or wrongful harm. Evidently there is nothing unlawful in agreeing to carry on business lawful in itself, though the property of rivals in that business may, in a wide sense be injured by the consequent competition. A bond which compels the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalizes default with overwhelming interest is unlawful and void. "Such a condition," the Court said, "is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable" (*y*).

"Immoral."—A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there (*z*). Similarly, money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered (*a*). On like grounds, ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back (*b*). An assignment of a mortgage to a woman for future cohabitation is void, and it can be set aside at the instance of the assignor though partial effect may have been given to the illegal consideration (*c*). Similarly, where the plaintiff advanced moneys to the defendant, a married woman, to enable her to obtain a divorce from her husband, and the defendant agreed to marry her as soon as she could obtain a divorce, it was held that the plaintiff was not entitled to recover back the amount, as the agreement had for its object the divorce of the defendant from her husband, and the promise of marriage given under such circumstances was *contra bonos mores* (*d*). An agreement to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced. Such an agreement may be for giving true evidence, and then there is no consideration, for "the performance of a legal duty is no consideration for a promise"; or it may be for giving favourable evidence either true or false, and then the consideration is vicious (*e*).

(*x*) *Nanda Singh v. Sunder Singh* (1901) Punj. Rec. no. 37.

(*y*) *Ram Sarup v. Bansi Mandar* (1915) 42 Cal. 742; *Satish Chandra v. Kashi Sahu* (1918) 3 Pat. L.J. 412.

(*z*) *Gaurinath Mookerjee v. Madhumani Peshakar* (1872) 9 B.L.R. App. 37; *Bani Mancharam v. Regina Stanger* (1907) 32 Bom. 581, at pp. 586 et seq.; *Choga Lal v. Piyari* (1908) 31 All. 58.

(*a*) *Bholi Baksh v. Gulia* (1876) Punj. Rec. no. 64.

(*b*) *Alla Baksh v. Chunia* (1877) Punj. Rec. no. 26.

(*c*) *Kandaswami v. Narayanaswami* (1923) 45 Mad. L. J. 551. See also *Alice Mary Hill v. William Clark* (1905) 27 All. 266.

(*d*) *Bai Vijli v. Nansa Nagar* (1885) 10 Bom. 152.

(*e*) *Sashannah Chetti v. Ramasamy Chetty* (1868) 4 M.H.C. 7.

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A consideration which is immoral at the time, and, therefore, would not support an immediate promise to pay for it, does not become innocent by being past; and so in *Husseinali v. Dinbai* (f), and again, in *Kisondas v. Dhondu* (g) it was held that past cohabitation is not good consideration for a transfer of property. The English view of such cases is that the alleged consideration is bad simply as being a past consideration.

“Opposed to public policy.”—The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. The doctrine of public policy is not to be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy (h); it has even been said in the House of Lords that “public policy is always an unsafe and treacherous ground for legal decision” (i). This does not affect the application of the doctrine of public policy to new cases within its recognised bounds.

1. Trading with enemy.—It is long settled law that all trade with public enemies without licence of the Crown is unlawful. “The King’s subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King, without the King’s licence” (j). This includes shipping a cargo from an enemy’s port even in a neutral vessel (k). If the performance of a contract made in time of peace is rendered unlawful by the outbreak of war, the obligation of the contract is suspended or dissolved according as the intention of the parties can or cannot be substantially carried out by postponing the performance till the end of hostilities (l). The recent development of cases of this class is dealt with under sec. 56 below. The rules under this head become applicable only when an actual state of war exists. A contract of insurance made before war cannot be vitiated, as regards a loss by seizure before any act of public hostility, by the fact that war did break out shortly afterwards (m).

(f) (1923) 25 Bom. L.R. 252.

(g) (1920) 44 Bom. 542; *Sabava v. Yamanappa* (1933) 35 Bom. L. R. 345, (‘33) A.B. 209.

(h) Lord Halsbury, *Janson v. Driefontein Consolidated Mines* [1902] A. C. 484, 491. See also *Shrinivasdas Lakshmi Narayan v. Ramchandra Ramrattandas* (1920) 44 Bom. 6; *Abdul Rahim v. Raghunath Sukul* (‘31) A.P. 22.

(i) Lord Davey [1902] A.C. at p. 500.

(j) Lord Macnaghten, *Janson v. Driefontein Consolidated Mines* [1902] A.C. at p. 499.

(k) *Esposito v. Bowden* (1857) 7 E. & B. 763.

(l) *Esposito v. Bowden* (1857) 7 E. & B. 763.

(m) *Janson v. Driefontein Consolidated Mines* [1902] A.C. 484, followed in *Wolf & Sons v. Dadyba Khimji & Co.* (1920) I.L.R. 44 Bom. 631.

2. **Stifling prosecution.**—Agreements for stifling prosecutions are a well-known class of those which the Courts refuse to enforce on this ground. The principle is “that you shall not make a trade of a felony” (n). In England the compromise of any public offence is illegal. If the accused person is “innocent, the law [is] abused for the purpose of extortion; if guilty, the law [is] eluded by a corrupt compromise screening the criminal for a bribe” (o).

A compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful (p). This perhaps is of no importance in Indian practice, where we have a statutory list of compoundable offences (q). “The criminal law of this country makes a difference between various classes of offences. With regard to some, it allows the parties to come to an agreement and either not to take proceedings or to drop the proceedings after institution in a few instances even without the leave of the Court, and, in other instances, with the leave of the Court. But there are other instances which cannot be compounded or arranged between the parties. If the offence [is] compoundable and [can] be settled in or out of Court without the leave of the Court, there seems no reason why [a compromise] should be regarded as forbidden by law or as against public policy, the policy of the criminal procedure being to allow such a compromise in such cases” (r). Thus where A agreed to execute a kabala of certain lands in favour of B in consideration of B abstaining from taking criminal proceedings against A with respect to an offence of simple assault which is compoundable, it was held that that the contract was not against public policy and could be enforced (s). But where the offence is non-compoundable as where the charge is one of criminal breach of trust and the offence is compounded by the accused passing a bond to the complainant, the latter cannot recover the amount of the bond (t). A bond in discharge of a pre-existing liability is valid although on execution of the bond a prosecution of the executant for a non-compoundable offence is withdrawn. This is because the withdrawal of the prosecution may be the motive but is not the consideration or object of the bond (u).

(n) Lord Westbury, *Williams v. Bayley* (1866) L.R. 1 H.L. 200, 220.

(o) *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 357.

(p) *Fisher & Co. v. Apollinaris Co.* (1875) L.R. 10 Ch. 297, as qualified by *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 351. See also *Tek Chand v. Harjas Rai-Arjau Das* (1929) 117 I.C. 74, (29) A.L. 564.

(q) See s. 345, Criminal Procedure Code, 1898; see also Penal Code, ss. 213, 214.

(r) Per Cur. *Amir Khan v. Amir Jan*

(1898) 3 C.W.N. 5, followed, *Ahmed Hassan v. Hassan Mahomed* (1928) 52 Bom. 603.

(s) *Ibid.*

(t) *Majibar v. Syed Muktashed* (1912) 40 Cal. 113; *Mottai v. Thanappa* (1914) 17 Mad. 385; *Ahmed Hassan v. Hassan Mahomed* (1928) 52 Bom. 693; *Habidad Khan v. Abdul Rahman* (1931) 53 All. 130, (31) A.A. 128.

(u) *Shaikh Gafoor v. Mt. Hemanta* (31) A. C. 416; *Deb Kumar v. Anath Bandhu* (1931) 35 C. W. N. 28, (31) A. C. 421.

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As a suit will not lie on an agreement to stifle a prosecution so an agreement of this class will not avail as a defence to a suit. Thus, where in a suit for damages for wrongful arrest and confinement the defendant pleaded an agreement under which the plaintiff was to give up all claims against the defendant for his arrest and confinement in consideration of the defendant withdrawing charges of criminal trespass and being a member of an unlawful assembly preferred against the plaintiff, it was held that, the latter offence being non-compoundable, the agreement could not be set up as an answer to the suit (v).

3. "Champerty and Maintenance."—The practices forbidden under these names by English law may be summarily described as the promotion of litigation in which one has no interest of one's own. Maintenance is the more general term; champerty, which in fact is the subject of almost all the modern cases, is in its essence "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action" (w). Agreements of this kind are equally illegal and void whether the assistance to be furnished consist of money, or, it seems, of professional assistance, or both (x). They are in practice often found to be also disputable on the ground of fraud or undue influence as between the parties (y).

The specific rules of English law against maintenance and champerty have not been adopted in British India (z); but the principle, so far as it rests on general grounds of policy, is regarded as part of the law of "justice, equity, and good conscience" to which the decisions of the Court should conform. The leading judgment to this effect is in *Fischer v. Kamala Naicker* (a), an appeal from the Sudder Dewanny Adawlut, Madras. In *Bhagwat Dayal Singh v. Debi Dayal Sahu* (b), the Judicial Committee clearly laid it down that an agreement champertous according to English law was not necessarily void in India; it must be against public policy to render it void here. A present transfer of property for consideration by a person who claims it as against another in possession thereof, but who has not yet established his title thereto, is not for that reason opposed to public policy (c).

(v) *Dalsukhram v. Charles de Bretton* (1904) 28 Bom. 326.

(w) *Hutley v. Hutley* (1873) L. R. 8 Q.B. 112, per Blackburn, J.; and see per Chitty, J., *Guy v. Churchill* (1888) 40 Ch. D. at p. 488.

(x) *Stanley v. Jones* (1831) 7 Bing. 369, may be considered the leading modern case; *Re Attorneys and Solicitors Act* (1875) 1 Ch. D. 573.

(y) *Rees v. De Bernardy* [1896] 2 Ch. 437; *U Pe Gyi v. Maung Thein Shiv* (1923) 1 Rang. 565.

(z) *Ram Coomar Coondoo v. Chunder Cantu Mookerjee* (1876) L. R. 4 I.A. 23; 2 Cal. 233; for one recent example see *Banarsi Das v. Sital Singh* (1929) 121 I.C. 295 ('30) A. L. 392.

(a) (1860) 8 M.I.A. 170.

(b) (1908) 35 Cal. 420; L.R. 35 I.A. 48.

(c) *Achal Ram v. Kazim Husain Khan* (1905) 27 All. 271; L.R. 32 I.A. 113, as explained in *Bhagwat Dayal Singh v. Debi Dayal Sahu*, *supra*.

Similarly agreements to share the subject of litigation if recovered in consideration of supplying funds to carry it on are not in themselves opposed to public policy (d). "But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to them" (e). A contract to assist a litigant so as to delay the execution of a decree against him is opposed to public policy and cannot be enforced (f).⁹

Agreements between legal practitioners subject to the Legal Practitioners Act, 1879, and their clients making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained are illegal as being opposed to public policy (g).

4. **Interference with course of justice.**—It needs no authority to show that any agreement for the purpose or to the effect of using improper influence of any kind with judges or officers of justice is void. An agreement to pay a fee to a holy man for prayers for the success of a suit is not an interference with the course of justice (h).

5. **Marriage broccage contracts.**—Agreements to procure marriages for reward are undoubtedly void by the common law, on the ground that marriage ought to proceed, if not from mutual affection, at least from the free and deliberate decision of the parties with an unbiassed view to their welfare. In England, however, this topic is all but obsolete. Such questions have come before Indian Courts in several modern cases, with not quite uniform results. In all those cases, it will be observed, the parties to the suit have been Hindus, a community in which the consent of the marrying parties has rarely anything to do with the marriage contract, which is generally arranged by the parents or friends of the parties before they themselves are of an age to give a free and intelligent consent (i). But it has been held by

- (d) *Kunwar Ram Lal v. Nil Kanth* (1893) L.R. 20 I.A. 112; *Indar Singh v. Munshi* (1920) 1 Lah. 124.
 (e) *Ram Coomar Goondoo v. Chunder Canto Mookerjee* (1876) L. R. 4 I.A. 23; 2 Cal. 233; *Baldeo Sahai v. Harbans* (1911) 33 All. 626; *Marina Viranna v. Valliuri Ramanamma* (1927) 109 I.C. 87, ('28) A.M. 437; *Ramanamma v. Viranna* (1931) 33 Bom. L. R. 960, ('31) A.P.C. 100; *Amrita v. Pratap* (1931) 52 C. L. J. 492,

- ('31) A.C. 144; *Lucy Moss v. Mah Nyein* ('33) A.R. 418.
 (f) *Nand Kishore v. Kunj Behari* (1933) All. L. J. 85, ('33) A.A. 303.
 (g) *Ganga Ram v. Devi Das* (1907) Punj. Rec. no. 61.
 (h) *Balasundra Mudakar v. Mahomed Oosman* (1930) 53 Mad. 29, 57 Mad. L. J. 154.
 (i) *Ch. Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1896) 21 Bom. 23.

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the High Courts in India that an agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the minor in marriage, is void as being opposed to public policy (j). So also an agreement to pay a penalty in case a minor daughter is not given in marriage to a particular person is void (k). Again there is no doubt that an agreement is by a person to pay money to a stranger hired to procure a wife is opposed to public policy and will not be enforced by any of the Indian Courts (l).

6. **Agreements tending to create interest against duty.**—One of the reasons suggested for not enforcing agreements to reward parents for giving their children in marriage is that such agreements tend to a conflict of interest with duty. The same principle is applied by the common law to dealings of agents and other persons in similar fiduciary positions with third persons. An agent must not deal in the matter of the agency on his own account without his principal's knowledge. In the present Act the rules on this head are embodied in the chapter on Agency (m), and will accordingly be considered in that place. If a person enters into an agreement with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with public duty, the agreement is void (n).

7. **Sale of public offices.**—Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons; and such sales are forbidden in England by various statutes said to be in affirmance of the common law (o). The cases in India on this branch of the subject have arisen principally in connection with religious offices. The sale of the office of a *sebai* has been held invalid by the High Court of Madras (p). Similarly, the office of *mutwali* of a *wakf* is not transferable (q), nor the land which is the emolument of a religious office (r).

(j) *Dholidas v. Fulchand* (1897) 22 Bom. 658; *Baldeo Das v. Mohamaya* (1911) 15 C.W.N. 447; *Kalavangunta Venkata v. Kalavangunta Lakshmi* (1908) 32 Mad. 185; *Abbas Khan v. Nur Khan* (1920) 1 Lah. 574.

(k) *Devarayan v. Mulhuraman* (1914) 37 Mad. 393, 18 I. E. 515; *Fazal Rahim v. Nur Mohamad* ('35) A. Pesh. 121.

(l) *Vaihyananathan v. Gungarazu* (1893) 17 Mad. 9; *Pitamber v. Jagjiwan* (1884) 13 Bom. 131; *Bhan Singh*

v. Kaka Singh ('33) A.L. 849.
(m) Ss. 215, 216.

(n) *Sitarampur Coal Co., Ltd. v. Colley* (1908) 13 C.W.N. 59.

(o) See Pollock, Contract, 396.

(p) *Kuppa Gurukul v. Dora Sami* (1822) 6 Mad. 76. See also *Gnana-sambanda Pandara Sannadhi v. Velu Pandaram* (1900) 23 Mad. 271; L. R. 27 I. A. 69.

(q) *Wahid Ali v. Ashruff Hossain* (1882) 8 Cal. 732.

(r) *Anjaneyalu v. Sri Venugopala Rice Mill, Ltd.* (1922) 45 Mad. 620.

An agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void under this section. Similarly, an agreement by one co-sharer in a mahal to pay an annuity to another co-sharer in consideration of the latter withdrawing his candidature for lambardarship is opposed to public policy and void (s). If *A* pays money to *B* who promises to use his influence and to secure *A*'s son an appointment in the public service, *A* cannot recover the money if his son does not secure the appointment (t).

See
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8. **Agreements tending to create monopolies.**—Agreements having for their object the creation of monopolies are void as opposed to public policy (u).

9. **Agreement not to bid.**—An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful (v). Such an agreement is not unlawful if the object is merely to make a good bargain (w). But it is unlawful, if the object is to defraud a rival decreeholder (x).

Waiver of illegality.—Agreements which seek to waive an illegality are void on grounds of public policy (y). Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys.

Void Agreements.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Agreements void, if considerations and objects unlawful in part.

Illustration.

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful.

(s) *Puttural v. Raj Narain* (1931) 53 All. 609, ('31) A.A. 428.

(t) *Ledu v. Hiralal* (1916) 43 Cal. 115.

(u) *Somu Pillai v. The Municipal Council, Mayavaram* (1905) 28 Mad. 520; *Devi Dayal v. Narain* (1927) 100 I.C. 859 ('28) A. L. 33; *District Board, Jhelum v. Hari Chand* ('34) A. L. 474.

(v) *Hari v. Naro* (1894) 18 Bom. 342; *Doorga Singh v. Sheo Pershad*

(1889) 16 Cal. 194, 199.

(w) *Mahomed Meera v. Sanvasi Vijaya* (1900) 23 Mad. 227, 27 I.A. 17; *Maung Sein Htin v. Chek Pan Ngaw* (1925) 3 Rang. 275.

(x) *Ram Lal v. Rajendra Nath* (1933) 8 Luck. 233, ('33) A.O. 124.

(y) *Dhanukdhari v. Nathima* (1907) 11 C. W. N. 848; *La Banque v. La Banque* (1887) 13 App. Ca. 111.

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24, 25

Entire or divisible agreements.—This section is an obvious consequence of the general principle of sec. 23. A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (z).

An agreement with a pleader to pay a fee of Rs. 500 if he wins the suit and also to transfer to him part of the property in dispute, is not severable and is wholly void (a). Where a part of a consideration for an agreement was the withdrawal of a pending criminal charge of trespass and theft, it was held that the whole agreement was void (b). Where A promised to pay Rs. 50 per month to a married woman B, in consideration of B living in adultery with A and acting as his house-keeper, it was held that the whole agreement was void, and B could not recover anything even for services rendered to A as house-keeper (c). Similarly, a suit will not lie to recover money advanced as capital for the purposes of a partnership which is partly illegal (d).

25. An agreement made without consideration is void, unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

Agreement without
consideration void,
unless it is in writing
and registered.

(z) Willes, J., in *Pickering v. Ilfracombe Ry. Co.* (1868) L.R. 3 C.P. 235, at p. 250.

(a) *Kathu Jairam Gujar v. Vishwanath Ganesh Javadekar* (1925) 49 Bom. 619.

(b) *Srirangachariar v. Ramasami Ayyangar* (1894) 18 Mad. 189;

Bindeshari Prasad v. Lekhraj Sahu (1916) 1 Pat. L.J. 48, 60; *Bani Ramchandra v. Jayawanti* (1918) 42 Bom. 339.

(c) *Alice Mary Hill v. William Clarke* (1905) 27 All. 266.

(d) *Gopalrao v. Kallappa* (1901) 3 Bom. L. R. 164.

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do ; or unless
 or is a promise to compensate for something done.

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
 or is a promise to pay a debt barred by limitation law.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

(a) *A* promises, for no consideration, to give to *B* Rs. 1,000. This is a void agreement.

(b) *A*, for natural love and affection, promises to give his son, *B*, Rs. 1,000. *A* puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

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(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

Consideration.—This section declares, long after consideration has been defined (s. 2, sub-s. (d)), that (subject to strictly limited exceptions) it is a necessary element of a binding contract. The present section goes on to state the exceptional cases in which consideration may be dispensed with. The most obvious example of an agreement without consideration is a purely gratuitous promise given and accepted. Such a promise has no legal force unless it comes within the first class mentioned in the present section. But there are other less obvious cases; and they must be all the more carefully noted because neither the text nor the illustrations of this section throw any light on them. It is not enough that something, whether act or promise, appears on the face of the transaction, to be given in exchange for the promise. That which is given need not be of any particular value; it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged (see commentary on explanation 2, below); but it must be something which the law can regard as having some value, so that the giving of it effects a real though it may be a very small change in the promisee's position; and this is what English writers mean when they speak of consideration as good, sufficient, or valuable. An apparent consideration which has no legal value is no consideration at all. A performance or promise of this kind is sometimes called an "unreal" consideration.

Forbearance and compromise as consideration.—Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time. The giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration (e); but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action, does he not really get something for nothing, even if he believes he has a good case? The answer is that abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined is free to bring it before the proper Court, and have the judgment of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not; for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here. That which is abandoned or suspended

(e) *Jagadindra Nath v. Chandra Nath* (1903) 31 Cal. 242.

in a compromise is not the ultimate right or claim of the party, but his right of having the assistance of the Court to determine and, if admitted or held good, to enforce it. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong" (f).

The principle thus stated is followed by the Indian Courts (g). An agreement in the nature of a compromise of a *bona fide* dispute as to the right of succession to a priestly office is not without consideration (h); nor is a mutual agreement to avoid further litigation invalid on this ground (i); nor a family arrangement providing for the marriage expenses of female members of a joint Hindu family on a partition of the joint family property (j), nor an agreement entered into by a Hindu husband with his wife in settlement of a doubtful claim for maintenance (k).

Promise to perform existing duty.—It is well settled in England that the performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise; for such performance is no legal burden to the promisee, but, on the contrary, relieves him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing. Moreover, in the case of the duty being imposed by the general law, an agreement to take private reward for doing it would be against public policy. A person served with a subpoena is legally bound to attend and give evidence in a court of law, and a promise to compensate him for loss of time or other inconvenience is void for want of consideration (l). Similarly an agreement by a client to pay to his vakil after the latter had accepted the *vakalatnama* a certain sum in addition to his fee if the suit was successful is without consideration (m).

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein, or to perform the duty in some one of several admissible ways—in other words,

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| (f) Bowen, L. J., in <i>Miles v. New Zealand Alford Estate Co.</i> (1886) 32 Ch. Div. 266, 291. | <i>Mahadshet</i> (1899) 1 Bom. L.R. 495, 497. |
| (g) <i>Olati Pulliah Chetti v. Varadarajulu</i> (1908) 31 Mad. 474, at pp. 476, 477; <i>Krishna Chandra v. Hemaja Sankar</i> (1917) 22 C.W.N. 463 [where the claim was not <i>bona fide</i> .] | (i) <i>Bhima v. Ningappa</i> (1868) 5 B.H. C., A.C.J. 75. |
| (h) <i>Rameshwar Prosad v. Lachmi Prosad</i> (1904) 31 Cal. 111, 131-132; <i>Bhiwa Mahadshet v. Shivaram</i> | (j) <i>Anantanarayana v. Savithri</i> (1913) 36 Mad. 151. |
| | (k) <i>Indira Bibi v. Makarand</i> ('31) A.N. 197. |
| | (l) <i>Sushannah Chetti v. Ramasamy Chetti</i> (1868) 4 M.H.C. 7. |
| | (m) <i>Ramchandra Chintaman v. Kalu Raju</i> (1877) 2 Bom. 362. |

S. 25 to forego the choice which the law allows him—this is a good consideration for a promise of special reward (*n*).

If *A* is already bound to do a certain thing, not by the general law, but under a contract with *Z*, it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by *Z*, who is already entitled to claim performance. For *Z* is none the better thereby in point of law, nor *A* any worse.

Transfer of immovable property.—The section has been referred to in some cases of sale and mortgage of immovable property which have been said to be void for want of consideration; but this is incorrect. The Transfer of Property Act says that some of its sections shall be read as part of the Contract Act but does not say that any of the provisions of the Contract Act shall be read into the Transfer of Property Act. In *Tatia v. Babaji* (*o*) Farran, C. J., explained the difference between a completed conveyance and an executory contract. See Mulla's Transfer of Property Act, 2nd Ed., p. 42.

Negotiable instruments.—In the case of negotiable instruments proof of consideration is not necessary, for consideration is presumed to have been received. This presumption is enacted both in sec. 118 of the Negotiable Instruments Act, 26 of 1881 and in illustration (c) to sec. 114 of the Indian Evidence Act, 1872.

Consideration dispensed with.—The English doctrine that a contract in the form of a deed, i.e., under seal is valid without consideration has never been accepted in India (*p*). But under the Contract Act consideration is dispensed with in the following cases :

(a) **Registered writing.**—The fact that a contract is in writing and registered dispenses with consideration only if it is made for natural love and affection. A registered agreement between a Mahomedan husband and his wife to pay his earnings to her is within the provisions of cl. 1 of the section (*q*). So is a registered agreement whereby *A* on account of natural love and affection for his brother, *B*, undertakes to discharge a debt due by *B* to *C*. In such a case, if *A* does not discharge the debt, *B* may discharge it, and sue *A*, to recover the amount (*r*). It is not to be supposed that the nearness of relationship necessarily imports natural love and affection. Thus where a Hindu husband executed a registered document in favour of his wife,

(*n*) *England v. Davidson* (1840) 11 A. & E. 856 (reward to constable for services beyond duty).

(*o*) (1896) 22 Bom. 176.

(*p*) *Kaliprasad Tewari v. Raja Sahib*

Prahlad Sen (1869) 2 B.L.R. P.C. 111, 122.

(*q*) *Poonoo Bibee v. Fyez Buksh* (1874) 15 B. L. R. App. 5.

(*r*) *Venkatasamy v. Rangasamy* (1903) 13 Mad. L.J. 428.

whereby, after referring to quarrels and disagreement between the parties, the husband agreed to pay her for a separate residence and maintenance, and there was no consideration moving from the wife, it was held in a suit by the wife brought on the agreement that the agreement was void as being made without consideration. The recitals in the agreement showed that it was not made on account of natural love and affection (s).

(b) **Compensation for voluntary services.**—If the services have been rendered at the request of the promisor they are considered under sec. 2 (d)—see note “Past Consideration” at p. 10. The services here referred to must have been rendered voluntarily and the clause appears to cover services rendered without the knowledge of the promisor (t). Services rendered for a person other than the promisor are not within the clause (u). Again the promisor must have been in existence when the voluntary act was done, so that work done by a promoter of a company before its formation is not work done for the company (v). The act must have been done for a person competent to contract. Therefore a promise to repay money advanced during the minority of the promisor does not come within the exception (w). It is unnecessary to refer to English cases as the exception does not follow the common law rules.

✓ (c) **Promise to pay a time-barred debt.**—Sub-sec. (3) reproduces modern English law. This exception applies only where the promisor is a person who would be liable for the debt if not time-barred, and does not cover promises to pay time-barred debts of third persons (x).

✓ A promise to pay a debt due by a third person is void for want of consideration; but if a Hindu son promises to pay a time-barred debt due by his father he is liable under Hindu law to the extent of the ancestral property in his hands (y).

The distinction between an acknowledgment under sec. 19 of the Limitation Act and a “promise” within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorized in that behalf; and both have the effect of creating a fresh starting point of limitation. But while sec. 19 of the Limitation Act requires that an acknowledgment should be made

- (s) *Rajlukhy Dabee v. Bhootnath* (1900) 4 C.W.N. 488; see *Gopal Saran v. Sita Devi* (1932) 36 C.W.N. 392, 34 Bom. L.R. 470, ('32) A.P.C. 34.
 (t) *Sindha v. Abraham* (1895) 20 Bom. 755, per Farran, C.J.
 (u) See *Gajadhar v. Jagannath* (1924) 46 All. 775.
 (v) *Ahmedabad Jubilee S. & W. Co. v. Chhotatal* (1908) 10 Bom. L.R. 141, 143.

- (w) *Indran Ramaswami v. Anthappa Chettiar* (1906) 16 Mad. L. J. 422; *Suraj Narain v. Sukha Ahir* (1928) 51 All. 164.
 (x) *Pestonji v. Bai Meherbai* (1928) 30 Bom. L.R. 1407.
 (y) *Abani Bilas v. Kanti Chandra* (1934) 38 C.W.N. 253, ('34) A.C. 178; See *Champaklal v. Rayachand* (1932) 34 Bom. L.R. 1005, ('32) A.B. 522.

S. 25 before the expiry of the period of limitation, a promise under this section may be made after the period of limitation has expired. The Privy Council in *Maniram v. Seth Rupchand* (z) has said that an unconditional acknowledgment implies a promise to pay. But this implied promise is not a promise under this section. A promise under this section to pay a time-barred debt must be an express promise. Therefore if there is no express promise, a promise implied from an acknowledgment cannot be the basis of a suit under sec. 25 of this Act (a). To support a suit there must be a distinct promise and not a mere acknowledgment (b). The Bombay High Court had held that a khata balance or account stated was a mere acknowledgment which could not form the basis of a suit (c). But this case must be treated as no longer law, for the Privy Council has held that, even when the balance of indebtedness throughout the account is on one side, a statement of account is an agreement that the items on one side are discharged by the items on the other side and that the balance only is payable. This agreement constitutes a new cause of action as on an account stated for which limitation is under Art. 14 of the Limitation Act (d). On the other hand, where a tenant wrote to his landlord in respect of rent barred by limitation, "I shall send by the end of *Veyshak* month," it was held that the words constituted a promise under this section (e). An agreement between a creditor and a debtor entered into before the expiry of the period of limitation, whereby the date of payment is extended beyond the period of limitation, is valid though *verbal*, if there is a consideration for the agreement, e.g., payment of interest up to the extended date. Such an agreement is not an acknowledgment within the meaning of sec. 19 of the Limitation Act, nor is it a promise to pay a barred debt; it may be enforced at any time within three years from the date on which it was made (f). "A promise to pay may be absolute or conditional. If it is absolute, if there is no 'but' or 'if,' it will support a suit without anything else: if it is conditional, the condition must be performed before a suit upon it can be decreed (g).

Debt.—The expression "debt" here means an ascertained sum of money. A promise, therefore, to pay the amount that may be found due by an

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| <p>(z) (1906) 33 I. A. 165, 172, 33 Cal. 1047, 1058.</p> <p>(a) <i>Maganlal Harjibhai v. Amichand Gulabji</i> (1928) 52 Bom. 521; <i>Deoraj Tewari v. Indrasan Tewari</i> (1929) 8 Pat. 706; <i>Girdhari Lal v. Firm Bishnu Chand</i> (1932) 54 All. 506, ('32) A. A. 461.</p> <p>(b) <i>Gobind Das v. Sarju Das</i> (1908) 30 All. 268; <i>Mihir Lal v. Marquerite Dairy Farm</i> ('32) A. A. 38; <i>Allah Baksh v. Hamid Khan</i> ('31) A. A. 160.</p> | <p>(c) <i>Jethibai v. Pullibai</i> (1912) 14 Bom. L. R. 1020.</p> <p>(d) <i>Bishun Chand v. Girdhari Lal</i> (1934) 61 I. A. 273, 56 All. 376, 33 Bom. L.R. 723.</p> <p>(e) <i>Appa Rao v. Suryaprakasa Rao</i> (1899) 23 Mad. 94. See also <i>Laxumibai v. Ganesh Raghunath</i> (1900) 25 Bom. 373.</p> <p>(f) <i>Ibrahim Mallick v. Lalit Mohan Roy</i> (1923) 50 Cal. 974.</p> <p>(g) <i>Maniram v. Seth Rupchand</i> (1906) 33 I. A. 165, 172, 33 Cal. 1047, 1058; <i>Ballapragada v. Thammana</i> (1917) 40 Mad. 701.</p> |
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arbitrator on taking accounts between the parties is not a promise to pay a "debt" within this section (h). The word debt in this section has been defined as a sum payable in respect of a money demand recoverable by action (i), and includes a judgment-debt. Therefore a promise to pay the amount of a time-barred decree is valid and enforceable (j).

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Explanation 2—This explanation declares familiar principles of English law and equity. If there is some consideration which the law regards as valuable, the Court will not inquire into its adequacy but will leave the parties to make their own bargain. But inadequacy of consideration may be evidence that the promisor was the victim of some imposition. It may be evidence that the promisor's consent was not free; but it is not in itself conclusive, and standing alone mere inadequacy of consideration is not a bar even to a suit for specific performance. In a suit (k) to set aside a conveyance on the ground of inadequacy of consideration the Judicial Committee observed: "The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennent* (L. R. 2 Sc. & D. 6) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says:—'The transaction having clearly been a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition."

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of marriage void.

An agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife while the first was living would be void according to the literal terms of this section. It may be doubted whether such a result was ever contemplated by the Legislature. The Hindu law recognises polygamy, and as to Mahomedan law a man may have as many as four wives at a time. But neither law binds a man to marry more than one wife.

(h) *Doraisami v. Vaithilinga* (1917) 40 Mad. 31 [F. B.].

(i) *Doraiswami v. Vaithilinga* (1917) 40 Mad. 31, 39. I. C. 220 (F. B.): *Bharat National Bank v. Bishan Lal* (1932) 13 Lah. 448, ('32) A. L. 212.

(j) *Heera Lall v. Dhunput Singh* (1878) 4 Cal. 500; *Shripatray v. Govind* (1890) 14 Bom. 390.

(k) *The Administrator-General of Bengal v. Juggeswar Roy* (1877) 3 Cal. 192, 196.

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It would seem, therefore, that a provision in a Kabinnamah by which a Mahomedan husband authorizes his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddat* (l).

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Agreement in restraint of trade void.

Exception 1.—One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Saving of agreement not to carry on business of which good-will is sold.

Agreements in restraint of trade.—The section is general in its terms, and declares all agreements in restraint of trade void (m) *pro tanto*, except in three cases specified in the exceptions. The object appears to have been to protect trade. It has been said that “trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained” (n).

To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly brought within one of the exceptions. “The words ‘restraint from exercising a lawful profession, trade or business’ do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary.” This view of the section was expressed by Couch, C.J., in *Madhub Chunder v. Rajcoomar Doss* (o). The parties in that case carried on business in the same quarter of Calcutta as braziers. The defendants suffered loss from the plaintiff’s competition and agreed that if the plaintiff closed his business in that quarter they would pay him all the advances he had made to his workmen. The plaintiff complied but the defendants failed to pay. The plaintiff sued to recover the amount of the advances, but the restriction, though confined to a particular quarter was held to be void. In another case the plaintiff agreed with the defendant not to carry on the

(l) *Badu v. Badarannessa* (1919) 29 C. L. J. 230.

(m) Certainly not “illegal”: *Haribhai Maneklal v. Sharafali Isabji*

(1897) 22 Bom. 861, 866.

(n) Per Kindersley, J., in *Oakes & Co. v. Jackson* (1876) 1 Mad. 134, 145.

(o) (1874) 14 B. L. R. 76, 85, 86.

business of dubash for three years and for the same period to act as stevedore of five ships assigned to him by the defendant and no others. It was held that the agreement was void, as the first branch imposed an absolute, and the second a partial, restraint on the plaintiff's business (p).

Restraint during term of service.—An agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade. Such an agreement may be enforced by injunction where it contains a negative clause, express or implied (q), providing that the employee should not carry on business on his own account during the term of his engagement (r). Thus in *Charlesworth v. MacDonald* (s) the defendant agreed to serve the plaintiff, a physician and surgeon practising at Zanzibar, as an assistant for three years. The letter which stated the terms which the plaintiff offered and the defendant accepted contained the words "The ordinary clause against practising must be drawn up." No formal agreement was drawn up, and at the end of a year the defendant ceased to act as the plaintiff's assistant and began to practise in Zanzibar on his own account. It was held that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account during the period of the agreement (t).

Public policy.—The present section is very strong; it invalidates many agreements which are allowed by the Common Law; and it does not seem open to the Courts to hold that any agreement *in pari materia*, not coming within the terms of the section, is void on some unspecified ground of public policy. "So far as restraint of trade is an infringement of public policy, its limits are defined by section 27" (u).

Agreement not in restraint of trade.—This section aims at "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business not contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business" (v). A reasonable construction must be put upon the section, and not one which would render

(p) *Nur Ali Dubash v. Abdul Ali* (1892) 19 Cal. 765.

(q) See Specific Relief Act, 1877, s. 57, ill. (d); *Subha Naidu v. Haji Badsha* (1902) 26 Mad. 168, 172; *Pragji v. Pranjivan* (1903) 5 Bom. L. R. 878.

(r) *General Billposting Co. v. Atkinson* [1909] A. C. 118.

(s) (1898) 23 Bom. 103. See also *The Brahmaputra Tea Co., Ltd. v. Scarth* (1885) 11 Cal. 545, 550.

(t) The Bombay Court based its decision on the authority of *Lumley v. Wagner* (1852) 1 D. M. G. 604. See *Ehrman v. Bartholomew* [1898] 1 Ch. 671.

(u) Per Jenkins, C.J., in *Fraser & Co. v. The Bombay Ice Manufacturing Co.* (1905) 29 Bom. 107, at p. 120.

(v) Per Handley, J., in *Mackenzie v. Striramiah* (1890) 13 Mad. 472, 475.

S. 27 void the most common form of mercantile contracts (*w*). Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description as they were selling to the defendant is not in restraint of trade (*x*). Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade (*y*).

Trade combinations.—An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions, is not avoided by this section, and cannot be impeached as opposed to public policy under sec. 23 (*z*). In *Fraser & Co. v. The Bombay Ice Manufacturing Co.* (*a*) Sir Lawrence Jenkins, C.J., expressed a decided opinion that a stipulation restraining the parties to a combination agreement from selling ice manufactured by them at a rate lower than the rate fixed in the agreement was not void under this section. A stipulation not to gin cotton or to sell ice for less than a fixed rate does not restrain any party to the contract from ginning cotton or from selling ice; in other words, none of the parties is restrained from exercising his business of ginning cotton or selling ice. What it does provide for is that in the exercise of the business certain terms shall be observed. In an Allahabad case it has been held that agreements such as the above were neither in restraint of trade nor opposed to public policy (*b*).

“To that extent.”—The meaning of these words is that if the agreement can be broken up into parts, it will be valid in respect of those parts which are not vitiated as being in restraint of trade. Where the agreement is not so divisible, it is wholly void (*c*).

Exception 1.—This exception deals with a class of cases which had a leading part in causing the old rule against agreements in restraint of trade to be relaxed in England. The question in England is always whether the restraint objected to is reasonable with reference to the particular case and not manifestly injurious to the public interest (*d*).

The law of British India, however, is tied down by the language of this section to the principle of a hard and fast rule qualified by strictly limited exceptions; and, however mischievous the economical consequences may be, the Courts here can only administer the Act as they find it.

(*w*) *Mackenzie v. Striramiah* (1890) 13 Mad. 472 at p. 474.

(*x*) *Carlises, Nephews & Co. v. Ricknauth Bucktearmull* (1882) 8 Cal. 809.

(*y*) *Sadagopa Ramanjiah v. Mackenzie* (1891) 15 Mad. 79.

(*z*) *Fraser & Co. v. Bombay Ice Manufacturing Co.* (1904) 29 Bom. 107; *Bhola Nath v. Lakshmi Narain*

(1931) 53 All. 316, ('31) A.A. 83.

(*a*) (1905) 29 Bom. 109.

(*b*) *Kuber Nath v. Mahali Ram* (1912) 34 All. 587.

(*c*) *Parasullah v. Chandra Kant* (1917) 21 C.W.N. 979, 983.

(*d*) *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.* [1894] A.C. 535.

The kind of cases covered by this exception may be illustrated by the following decision where it was held that a covenant by the defendants on the sale of the good will of their business of carriers to the plaintiff not to convey passengers to and fro on the road between Ootacamund and Mettapolliem was not in restraint of trade: "So partial a restraint is not really adverse to the interests of the public at large" (e). In a later and similar case the business disposed of was that of a ferry and the restraint on the seller was limited to three years; but the Judicial Committee had no difficulty in holding that the transaction amounted to a real sale of goodwill and was enforceable (f).

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28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Agreements in restraint of legal proceedings void.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer to arbitration dispute that may arise.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Suits barred by such contracts.

[Repealed by Specific Relief Act, except in scheduled districts where that Act is not in force.]

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

(e) *Auchterlonie v. Charles Bill* (1868)
4 M.H. C. 77.

(f) *Chandra Kanta Das v. Parasullah*

Mullick (1921) L.R. 48 I.A. 508,
48 Cal. 1030.

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Agreement in restraint of legal proceedings.—"This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of sec. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunal. But if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law; that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts, but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded" (g). Thus a contract whereby it is provided that all disputes arising between the parties should be referred to two competent London brokers, and that their decision should be final, does not come within the purview of this section (h). Nor does a contract whereby it is provided that all disputes arising between the parties "should be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to the contract" (i); still less is it wrong for the parties to a pending suit to give the Court itself, if they choose so to agree, full power to decide the whole matter without further appeal (j). But a stipulation that parties to a reference shall not object at all to the validity of the award on any ground whatsoever before any court of law, does restrict a party absolutely from enforcing his rights in ordinary tribunals, and, as such, is void. The Courts have power, in spite of such a stipulation, to set aside an award on the ground of misconduct on the part of the arbitrator. It was so held by the Madras High Court in a case (k) in which the agreement to submit to arbitration contained a restrictive stipulation of the above character. Where there are two Courts, both of which would normally have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those Courts alone and not in the other does not contravene the provisions of this section (l).

(g) Per Garth, C.J., in *Coringa Oil Co., Ltd. v. Koegler* (1876) 1 Cal. 466, 468, 469; *Mulji Tejsing v. Ransi Devraj* (1909) 34 Bom. 13.

(h) *Coringa Oil Co., Ltd. v. Koegler*, last note; *William Jacks & Co. v. Harrowing Steamship Co., Ltd.*, ('32) A. S. 111.

(i) *Champsey v. Gill & Co.* (1905) 7 Bom. L. R. 805; *Chaitram v. Bridhichand* (1915) 42 Cal. 1140.

(j) *Bashir Ahmad v. Sadig Ali* (1930) 5 Luck. 391, 120 I. C. 826, ('29) A. O. 451; *Bhirgunath Prasad v. Annapurna* ('34) A. P. 644.

(k) *Burla Ranga Reddi v. Kalapalli Sithaya* (1883) 6 Mad. 368.

(l) *Milton & Co. v. Ojha Automobile Co.* (1930) 57 Cal. 1280, ('31) A. C. 279; *Lakshmivillas Mills Co. v. Vinayak* (1935) 37 Bom. L. R. 157, ('35) A. B. 198.

For the rest the section before us affirms the Common Law. Its provisions "appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts" (m). It does not affect the validity of compromises of doubtful rights, and this view is supported by the provisions of the Civil Procedure Code, which enable parties to a suit to go before the Court and obtain a decree in terms of a compromise (n).

"Rights under or in respect of any contract."—Note that this section applies only to cases where a party is restricted from enforcing his rights under or in respect of any *contract*. It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression "contract" does not include rights under a decree (o).

Limitation of time to enforce rights under a contract.—Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreement within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may *enforce* his rights, but which provide for a *release or forfeiture* of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which provides that "if the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be *forfeited*," is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the *Baroda Spg. & Wg. Co.'s* case (p).

No provision is made in the section for agreements extending the period of limitation for enforcing rights arising under it. In a case before the Judicial Committee (q) their Lordships expressed their opinion that an

(m) *Anant Das v. Ashburner & Co.* (1876) 1 All. 267.

(n) *Anant Das v. Ashburner & Co.* (1876) 1 All. 267.

(o) *Ramghulam v. Janki Rai* (1884) 7 All. 124, 131.

(p) *Baroda Spg. & Wg. Co., Ltd. v. Satyanarayan Marine & Fire Insurance Co., Ltd.* (1914) 38 Bom.

344. Foll. in *Girdharilal v. Eagle Star & British Dominions Insurance Co., Ltd.* (1923) 27 C.W.N. 955; *G. Rainey v. Burma Fire & Marine Insurance Co.* (1925) 3 Ran. 383; *Shakoor v. Hinde & Co.* (1932) 34 Bom. L.R. 634 ('32) A.B. 330.

(q) *East India Co. v. Odichur Paul* (1849) 5 M. I. A. 43, 70.

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agreement that, in consideration of an enquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitation in respect of the time employed in the inquiry is no bar to the plea of limitation, though an action might be brought for breach of such an agreement. There is hardly any doubt that an agreement which provides for a longer period of limitation than the law allows does not lie within the scope of this section. Such an agreement certainly does not fall within the first branch of the section. There is no restriction imposed upon the right to sue; on the contrary, it seeks to keep the right to sue subsisting even after the period of limitation. Nor is this an agreement limiting the time to enforce legal rights. It would, however, be void under sec. 23 as tending to defeat the provisions of the Limitation Act, 1908 (r). A restriction in a grant of maintenance which debarred the grantee from suing for maintenance more than one year in arrear was held to be void under this section (s).

Exception 1.—This exception “applies only to a class of contracts, where, as in *Scott v. Avery* (t), the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiff’s hand till some particular amount of money has been first ascertained by reference” (u).

The point is very similar to those which so frequently occur in England where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him as to what should be allowed in case of dispute for extras or penalties. It must not be supposed that the use of such terms as “sole judge” necessarily imposes any duty of proceeding in a quasi-judicial manner.

This class of cases must be distinguished from those where the obligation of a promisor, such as the duty of paying for work to be done or goods to be supplied is made, by the terms of the contract, to depend on the consent or approval of some person, as in a builder’s contract, the certificate of the architect, that the work has been properly done. Here there is no question of referring to arbitration, or anything like arbitration, a dispute subsequent to the contract, but the contract itself is conditional, or, in the language of the Act, contingent (ss. 31—36, below).

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Agreement void for uncertainty.

(r) *Ballepragada v. Thammana* (1917) 40 Mad. 701.

(s) *Saroj Bandhu v. Jnanda Sundari* (1932) 36 C.W.N. 555, (‘32) A. C. 720.

(t) (1885) 5 H. L. 811; *Cipriani v.*

Burnell (1933) 64 M.L.J. 284, (‘33) A. P.C. 91.

(u) Per Garth, C. J., in *Coringa Oil Co., Ltd. v. Koegler* (1876) 1 Cal. 466, 469; *Cooverji v. Bhimji* (1882) 6 Bom. 528, 536.

Illustrations.

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(a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut-oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*." As the price is capable of being made certain there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Ambiguous contracts.—Sec. 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. See also secs. 94—97 of the same Act. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties, but to make a new contract for them. The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price. See sec. 9 (1) of the Indian Sale of Goods Act, 1930.

Where the defendant passed a document to the *Agra Savings Bank* whereby he promised to pay to the manager of the bank the sum of Rs. 10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note, as it was impossible from its language to say for what period it was to subsist and what amount was to be paid under it (v). But if the agreement is capable of being made certain the section does not apply (w).

(v) *Carter v. The Agra Savings Bank* (1883) 5 All. 562.

(w) *Rami Naidu v. Seethan Naidu* (1935) 154 I.C. 321, ('35) A. M. 276.

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30. Agreements by way of wager are void ; and no suitAgreement by way
of wager void.

shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horserace.

Exception in favour
of certain prizes for
horse-racing.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code not affected.

Wagering contracts.—This section represents the whole law of wagering contracts now in force in British India, supplemented in the Bombay Presidency by Act III of 1865. It superseded Act 21 of 1848 (an Act for avoiding wagers).

There is no technical objection to the validity of a wagering contract. It is an agreement by mutual promises, each of them conditional on the happening or not happening of an unknown event. So far as that goes, promises of this form will support each other as well as any other reciprocal promises.

What is a wager ?—A wager has been defined as a contract by *A* to pay money to *B* on the happening of a given event, in consideration of *B* paying to him money on the event not happening (*x*). But Sir William Anson's definition, "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event," is neater and more accurate. To constitute a wager "the parties must contemplate the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee": Anson, *Law of Contract*, 17th ed. 221, 222. "But if one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager" (*y*). "It is of the essence of a wager that each

(*x*) *Hampden v. Walsh* (1876) 1 Q.B.D. 189, 192. See also per Lord Brampton, in *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q.B. 484, 490.

(*y*) Per Birdwood, J., in *Dayabhai Tribhovandas v. Lakhmichand Panachand* (1885) 9 Bom. 358, 363.

side should stand to win or lose according to the uncertain or unascertained event, in reference to which the chance or risk is taken " (z).

In *Alamai v. Positive Government Security Life Assurance Co.* (a), a case of life insurance, Fulton, J., said: "What is the meaning of the phrase 'agreements by way of wager' in sec. 30 of the Contract Act? In *Thacker v. Hardy* (b), Cotton, L.J., said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough including the majority of forward purchases and sales.

"A certain class of agreement such as bets, by common consent, come within the expression 'agreements by way of wagers.' Others, such as legitimate forms of life insurance, do not, though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless rather subtle, and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that when a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India" (c).

"By way of wager."—There is no distinction between the expression "gaming and wagering," used in the English Act and the repealed Indian Act 21 of 1848, and the expression "by way of wager," used in this section (d). The decisions under those Acts are still useful in construing the section.

Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of differences (e) in stock exchange transactions, with or without colourable provisions for the completion of purchases. Such provisions, if inserted, will not prevent the Court from examining the real nature of the agreement as a whole (f). "In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences (g). It is not sufficient if the intention to gamble exists on

(z) Per Jenkins, C.J., in *Sassoon v. Tokersey* (1904) 28 Bom. 616, p. 621.

(a) (1898) 23 Bom. 191.

(b) (1878) 4 Q. B. D. 685, 695.

(c) See *Trimble v. Hill* (1879) 5 App. Ca. 342; and *Kathama Natchiar v. Dorasingu* (1875) L.R. 2 I. A. 169, 186.

(d) *Kong Yee Lone & Co. v. Lowjee Nanjee* (1901) 29 Cal. 461, L.R.

28 I. A. 239.

(e) *Doshi Talakshi v. Shah Ujamsi Velsi* (1889) 24 Bom. 227, 229.

(f) *Re Gieve* [1899] 1 Q.B. 794, C. A.

(g) *Perosha v. Manekji* (1898) 22 Bom. 899, 903; *The Universal Stock Exchange v. Strachan* [1896] A. C. 166; *Eshoor Doss v. Venkatasubba Rau* (1895) 18 Mad. 306; *Ganesh Das v. Har Bhagwan* (1932) 138 I.C. 542, ('32) A. L. 273.

S. 30 the part of only one of the contracting parties. "Contracts are not wagering contracts unless it be the intention of *both* contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other" (*h*). It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another, according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market." This was laid down by the Judicial Committee in *Kong Yee Lone & Co. v. Lowjee Nanjee* (*i*) on appeal from the Court of the Recorder of Rangoon. In *Doshi Talakshi v. Shah Ujamshi Velsi* (*j*) certain contracts were entered into in Dholera for the sale and purchase of Broach cotton, a commodity which, it was admitted, never found its way either by production or delivery, to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The course of dealings was, however, such that none of the contracts was ever completed except by payment of differences between the contract price and the market price in Bombay on the *vaida* (settlement) day. It was held upon these facts that the contracts were by way of wager within the meaning of this section. On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This frequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contact with each other, and do not know the name of the person with whom they are contracting until after the bought and sold notes are executed. Under circumstances such as these, when a party launches his contract orders he does not know with whom the contracts would be made (*k*). And this presumption is considerably strengthened when the broker is authorized by the principal to contract with third persons in his (the broker's) own name; for the third person may in such case remain undisclosed even after the contract is made (*l*). But the presumption may be rebutted by evidence of a common intention to wager, though the contract has been brought about by a broker (*m*). If the agreement does not involve loss to either party, it is

(*h*) *Ajudhia Prasad v. Lalman* (1902) 25 All. 38; *Sassoon v. Tokersey* (1904) 28 Bom. 616; *Meghji v. Jadhavji* (1910) 12 Bom. L.R. 1072.
 (*i*) (1901) 29 Cal. 461, 467, L. R. 28 I. A. 239.
 (*j*) (1899) 24 Bom. 227.

(*k*) *J. H. Tod v. Lakhmidas* (1892) 16 Bom. 441, 446.
 (*l*) *Perosha v. Manekji* (1898) 22 Bom. 899; *Sassoon v. Tokersey* (1904) 28 Bom. 616.
 (*m*) *Eshoor Doss v. Venkatasubba Rau* (1895) 18 Mad. 306.

not a wager. Therefore a contest for a prize subscribed by other parties is not a wager (n).

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Teji Mandi transactions.—In a Bombay case Beaman, J., held that *teji mandi* transactions were transactions by way of wager, and they were void under this section (o). The decisions bearing on his point were considered in a later case where it was held that the mere fact that a transaction was *teji mandi* did not make it a wagering transaction; to constitute it a wager it must be proved that there was a common intention to pay differences only. And this, it is submitted, is the correct rule (p). *Teji mandi* contracts are also known as *nazarana* contracts (q).

Agreements between Pukka Adatia and his constituents.—It was at one time held in some Bombay cases that a pukka adatia was merely the agent of his constituent, and that therefore no transaction between them could be a wagering transaction. In *Bhagwandas v. Kanji* (r), however, it was held, on the evidence of custom, that as regards his constituent the pukka adatia was a principal and not a disinterested middleman bringing two principals together. Since that decision the High Court of Bombay held in two cases that a transaction between a pukka adatia and his constituent may be by way of wager like any other transaction between two contracting parties, and that the existence of the pukki adat relationship does not of itself negative the possibility of a contract being a wagering contract as between them (s). One of those cases was taken to the Privy Council, which affirmed the principle laid down by the Bombay High Court (t).

Agreements collateral to wagering contracts.—Thus far our observations are confined to suits between the principal parties to a contract. Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of transaction entered into by him as such, or for indemnity for losses incurred by him in such transactions, on behalf of his principal.

Apart from a Bombay enactment to be presently noticed there is no statute which declares agreements collateral to wagering contracts to be

- (n) *Babasaheb v. Rajaram* (1931) 33 Bom. L.R. 260, 133 I.C. 254, ('31) A.B. 264, citing *Schoolbred v. Roberts* (1899) 2 Q.B. 560.
 (o) *Ramchandra v. Gangabison* (1910) 12 Bom. L.R. 590.
 (p) *Manilal Dharamsi v. Allibhai Chagla* (1923) 47 Bom. 263, 24 Bom. L.R. 812, 68 I.C. 481, ('22) A.B. 408; approved *Sobagmal Gianmal v. Mukundchand Batia* (1926) L.R. 53 I.A. 241, 51 Bom. 1, 28 Bom. L.R. 1376, 98 I.C. 338, ('26) A.P.C. 119; *Ram Prasad v. Ranji Lal* (1927) 50 All. 115, 103 I.C. 218, ('27) A.A.

- 795; *Narandas v. Jhanshyandas* (1933) 35 Bom. L.R. 640, 147 I.C. 412, ('33) A.B. 348.
 (q) *Pirithi Singh v. Matu Ram* (1932) 13 Lah. 766, 138 I.C. 241, ('32) A.L. 356.
 (r) (1905) 30 Bom. 205.
 (s) *Burjorji v. Bhagwandas* (1914) 38 Bom. 204; *Chhogmal v. Jainarayan* (1915) 39 Bom. 1.
 (t) *Bhagwandas v. Burjorji* (1918) L.R. 45 I.A. 29, 42 Bom. 373. See also *Manilal Raghunath v. Radha Kisson Ramjiwan* (1921) 45 Bom. 386.

S. 30 void. Nor is there anything in the present section to render such agreements void. It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission, or the losses sustained by him, even though the contracts in respect of which the claim is made are contracts by way of wager (*u*). Conversely, an agent who has received money on account of a wagering contract is bound to restore the same to his principal (*v*). Such transactions are neither against the provisions of the present section nor of sec. 23 (*w*).

The law is, however, different in the Presidency of Bombay. In that Presidency, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of Bombay Act III of 1865. Secs. 1 and 2 of the Act run as follows:—

Sec. 1 : “All contracts, whether by speaking, writing, or otherwise knowingly made, to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void: and no suit shall be allowed in any Court of justice for recovering any sum of money paid or payable in respect of any such contract or contracts or any such agreement or agreements as aforesaid.”

Sec. 2 : “No suit shall be allowed in any Court of justice for recovering any commission, brokerage fee, or reward in respect of the knowingly effecting or carrying out or of the knowingly aiding in effecting or in carrying out or otherwise claimed or claimable in respect of any such agreements by way of gaming or wagering or any such contracts as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage fee or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid.”

But in order to make the sections of the Bombay Act applicable it must be shown that the transaction in respect of which the brokerage, commission, or losses are claimed must amount to a wagering agreement, and it is no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts

(*u*) *Daya Ram v. Murli Dhar* (1927) 49 All. 926, 102 I.C. 605, ('27) A.A. 823; *Chekka v. Gajjala* (1904) 14 Mad. L.J. 326; much more can the principal recover from the agent money deposited with him as security: *Hardeo Das v. Ram Prasad* (1926) 49 All. 438, 100 I.C. 774, ('27) A.A. 238. See *Mutsaddi Lal-Sewa Ram v. Bhagirath* (1929)

10 Lah. L. J. 522, 115 I.C. 424, ('29) A.L. 375.

(*v*) *Bhola Nath v. Mul Chand* (1903) 25 All. 639; *Hardeo Das v. Ram Prasad* (1927) 49 All. 438, 100 I.C. 774, ('27) A.A. 238; *Muthuswami v. Veeraswami* (1936) 70 M.L.J. 433, 163 I.C. 251 ('36) A.M. 486.

(*w*) *Bani Madho Das v. Kaunsal Kishor Dhusar* (1900) 22 All. 452.

as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payments and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons (x). It has also been held that a deposit paid on a wagering contract cannot be recovered in a case subject to the provisions of sec. 1 of the Bombay Act, whether the person suing is a winner or a loser in the transaction (y). An agreement to settle differences arising out of a nominal agreement for sale which was really a gamble is no less void than the original wagering transaction (z).

The result therefore is that, though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is not void except in the Bombay Presidency (a). It may be hoped that in any future revision of the Contract Act the provisions of the Bombay Act will be incorporated in the present section so as to render the law uniform on this subject in the whole of British India.

Wagering policies.—The cases of life insurance and marine insurance afford illustration of another variety of wagering contracts.

In *Alamai v. Positive Government Security Life Insurance Co.* (b) the High Court of Bombay held that in India an insurance for a term of years on the life of a person in whom the insurer had no interest was void under this section. In that case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after Mehub Bi assigned the policy to the plaintiff. Mehub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants. It was held on the evidence that the policy was not effected by Mehub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mehub Bi.

Promissory note for debt due on a wagering contract.—Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note must be regarded "as made

(x) *Perosha v. Manekji* (1898) 22 Bom. 899, 907; *Sassoon v. Tokersey* (1904) 28 Bom. 616.

(y) *Ramchandra v. Gangabison* (1910) 12 Bom. L. R. 590.

(z) *Jivanchand Ghambirmal v. Laxminarayan* (1925) 49 Bom. 689, 27

Bom. L. R. 941, 89 I. C. 883, ('25) A. B. 511.

(a) *Leicester & Co. v. S. P. Mullick* (1922) 27 C. W. N. 442; followed, *W. Banvard v. M. M. Moolla* (1928) 7 Rang. 263, 119 I. C. 215, ('29) A. R. 241.

(b) (1898) 23 Bom. 191.

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without consideration"; for "a contract which is itself null and void cannot be treated as any consideration for a promissory note" (c).

Award on debt due on wagering contract.—An arbitration clause in a wagering contract is not to be treated as a covenant distinct from the contract of wager and is therefore void. An award resulting from a reference in such a contract is void and a suit will lie to set it aside (d).

Suit to recover deposit.—The prohibition contained in this section as regards the recovery of money deposited pending the event of a bet applies only to the case of winners. The winner of a wager or a bet cannot sue to recover the amount deposited by the loser with the stake-holder, but it is quite competent to the loser to recover back his deposit before the stake-holder has paid it over to the winner (e). In a case, however, governed by the provisions of Bombay Act III of 1865, even a loser cannot recover back the deposit (f).

CHAPTER III.

Of Contingent Contracts.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. *parallel*

"Contingent contract" defined.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Of the section in general.—We do not know why the word "contingent," familiar to English lawyers only in the law of real property, was preferred to "conditional." A promise is said to be absolute or unconditional when the promisor binds himself to performance in any event, conditional when performance is due only on the happening of some uncertain event in the future or if some state of facts not within the promisor's knowledge now exists.

In the text of the Act the words "some event collateral to such contract" seem to mean that the event is neither a performance directly promised as part of the contract, nor the whole of the consideration for a

- (c) *Trikam Damodar v. Lala Amirchand* (1871) 8 B. H. C. A. C. 131.
See also *Doshi Talakshi v. Shah Ujamsi Velsi* (1899) 24 Bom. 227;
Kong Yee Lone & Co. v. Lowjee Nanjee (1901) 29 Cal. 461, L. R. 28 I. A. 239.
(d) *Karunakumar v. Lankaran* (1933)

- 60 Cal. 856, 149 I. C. 61, ('33) A. C. 759.
(e) Of course not after payment: *Maung lo Hmein v. Maung Aung Mya* (1925) 3 Ran. 543, 93 I. C. 105, ('26) A. R. 48.
(f) *Ramchandra v. Gangabison* (1910) 12 Bom. L. R. 590.

promise. Thus, if I offer a reward for the recovery of lost goods, there is not a contingent contract; there is no contract at all unless and until some one, acting on the offer, finds the goods and brings them to me. Again, a contract to pay a man for a piece of work is very commonly made on the terms that he is to have no pay till the work is all done; but the completion of the work, being the very thing contracted for, is not collateral to the contract, and the contract is not properly said to be contingent, though the performance of the work may be, and often is, a condition precedent to the payment of the wages.

The illustration to the section is the ordinary one of a contract of fire insurance. All contracts of insurance and indemnity are obviously contingent. A wager is a contingent agreement, but sec. 30 prevents it from being a contract.

Contingency dependent on act of party.—Words of promise amount to no promise at all if their operation is expressed to be dependent on the mere will and pleasure of the promisor, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable (g). But the operation of a promise may well be dependent on a voluntary act other than the mere declaration of the promisor's will to be bound. The act may be that of a third person: thus a promise to pay what *A* shall determine is perfectly good. The act may also be that of the promisor himself so long as it is not an act of mere arbitrary choice whether he will be bound or not, as in the common case of goods being sold on approval, where the sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial (h). So, in the case of goods to be manufactured to order it may be a term of the contract that the work shall be done to the customer's approval and then the customer's judgment, acting "*bona fide* and not capriciously," is decisive (i). On the same principle if a clause in a contract provides that a party's disability to perform his promise shall be a cause for annulling the contract but shall give no remedy in damages, this does not apply to a disability brought about by the promisor's own conduct (j). A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and such a condition is good (k). Payment of a policy of insurance may be conditional on proof of the claim

(g) *Roberts v. Smith* (1859) 4 H. & N. 315.

(h) *Eliphick v. Barnes* (1880) 5 C. P. D. 321. See sec. 24 of the Indian Sale of Goods Act.

(i) *Andrews v. Belfield* (1857) 2 C. B. N. S. 779.

(j) *New Zealand Co. v. Société des ateliers et chantiers de France* [1919] A. C. 1; *Chunilal Dayabhai & Co. v. Ahmedabad Fine Spinning, &c., Co.* (1921) I. L. R. 46 Bom. 806.

(k) *Clarke v. Watson* (1865) 18 C. B. N. S. 278.

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satisfactory to the directors of the insurance company being furnished ; this means such proof as they may reasonably require (l).

Enforcement of
contracts contingent on
an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations.

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

There are some cases which may be dealt with either under this section or sec. 56, for it may be equally true to say that performance of a material part of the contract has become impossible, and that the contract was made on the contingency of an event which has become impossible or it may be hard at first sight at any rate to say which section is the more applicable. See notes on sec. 56, below, and *Krell v. Henry* (m) where a contract to hire the use of a room in London to view the intended coronation procession of June, 1902, was held, in effect, to be conditional on the procession taking place. Whether a contract is of the kind specified in this section may be a question of fact or construction.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Enforcement of
contracts contingent on
an event not happening.

Illustration.

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

(l) *Braunstein v. Accidental Death Insurance Co.* (1861) 1 B. & S. 782. (m) [1903] 2 K. B. 740.

- 34.** If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

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When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

Illustration.

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

Secs. 32 and 33 cannot be made plainer by any commentary. Sec. 34 is in accordance with very old English authority. A man who has contracted to sell and convey a piece of land to *A* on a certain date breaks his contract by conveying it to *Z* before that date, though he might possibly get the land back in the meantime. The application of the present section, or any section in this group, must obviously depend on the special facts and the construction of the contract (*n*).

- 35.** Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts become void which are contingent on happening of specified event within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations.

- (a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(n) See for instance *Jaunpur Sugar Factory, In re* (1925) 23 All. L. J. 608, 89 I. C. 438, (25) A. A. 658.

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(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreements contingent on impossible events void.

Illustrations.

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

The two last foregoing sections explain themselves.

CHAPTER IV.

Of the Performance of Contracts.

Contracts which must be performed.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Obligation of parties to contracts.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

Performance and discharge.—A contract being an agreement enforceable by law (s. 2, above) creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge.

As to performance by an agent, see sec. 40, below. The rule of the Common Law which is here affirmed in the second paragraph was stated in England in 1869, by Willes, J., a judge of very great learning and authority. "Generally speaking, contracts bind the executor or administrator though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary" (o).

Such personal considerations as are here mentioned extend, as shown by illustration (b) to the present section to contracts involving special personal confidence or the exercise of special skill (*cp.* s. 40, below). They do not extend to mere exercise of ordinary discretion. The executors of a man who has ordered goods deliverable by instalments under a continuing contract may be bound to accept the remaining instalments, for the duty or discretion of seeing that the goods supplied are according to contract does not require any personal qualifications (p).

Succession to benefit of contract.—Generally the representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate. It is no real exception to this rule that in some cases the nature of the contract is in itself, or may be made by the intention of the parties, such that the obligation is determined by the death of the promisee. The contract to marry is the most obvious example in the Common Law. Another more seeming than real exception is where performance by the other party is conditional on some performance by the deceased which was not completed in his lifetime and is of such a personal character that performance by his representatives cannot be equivalent. An architect's executor, for example, cannot insist on completing an unfinished design, even if he is a skilled architect himself; and accordingly he cannot fulfil the conditions on which payment, or further payment, as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts for ordinary building work, for they have only to procure workmen of ordinary competence and similarly in other cases. All rules of this kind are in aid of the presumed intention of the parties and if the parties have expressed a special intention it must prevail.

(o) *Farrow v. Wilton* L. R. 4 C. P. 744, 746. | (p) *Wentworth v. Cock* (1859) 10 A. & E. 42.

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The rights of an insolvent debtor's assignee to sue on his contracts depends, of course, on statute ; but in the absence of more specific provisions they are governed by the same principles as an executor's.

Assignment of contracts.—Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles were restated in our own time by the Court of Appeal in England : "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else, this can only be brought about by the consent of all three, and involves the release of the original debtor. . . . On the other hand, it is equally clear that the benefit of a contract can be assigned and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and can be put in suit by the assignee in his own name after notice There is, however, another class of contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person To suits on these contracts, therefore, the original contractee must be a party whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable " (q).

The Contract Act has no section dealing generally with assignability of contracts. A contract which, under section 40, is such that the promisor must perform it in person has been held not to be assignable. "When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which could not be assigned without the promisor's consent so as to entitle the assignee to sue him on it " (r).

Where *A*, a salt manufacturer, agreed with *B*, to manufacture for him for a period of seven years such quantity of salt as *B* required in consideration of *B* paying him at a fixed rate, four months' credit after each delivery

(q) *Tolhurst v. Associated Cement Manufacturers* [1902] 2 K. B. 660, 668, 669, per Collins, M.R.

(r) *Toomey v. Rama Sahi* (1890) 17 Cal. 115, at p. 121.

being allowed to *B* and of his paying Government taxes and dues, and executing all but petty repairs in *A*'s factory, it was held that the contract was based upon personal consideration, and that it was not therefore competent to *B* to assign the contract without *A*'s consent (s). After referring to the terms of the contract the Court said: "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract" (t). But where *A* agreed to sell certain gunny bags to *B*, which were to be delivered in monthly instalments for a period of six months, and the contract contained certain buyer's option as to quality and packing, it was held that the clause as to buyer's option did not preclude *B* from assigning the contract (u). See Specific Relief Act, sec. 21 (b) and illustrations.

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Any other law.—The most important statutory discharge of contracts, outside the present Act, is that which follows on insolvency. See the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. See also secs. 62 to 67.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal
to accept offer of
performance.

Every such offer must fulfil the following conditions:—

(1) it must be unconditional:

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do:

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

- (s) *Namasivaya Gurukkal v. Kadir Ammal* (1894) 17 Mad. 168.
(t) *Humble v. Hunter* (1848) 12 Q. B. 310, at p. 317.

- (u) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, affirmed on appeal 34 Cal. 289.

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Illustrations.

A contracts to deliver to *B* at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B*'s warehouse on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Tender.—The subject-matter of the present section is to be found under the head of Tender in English books.

The first sub-section is chiefly though not exclusively, appropriate to an offer of payment; the second and third concern offers of other kinds of performance, such as delivery of goods.

The principles were laid down in England in 1843 in *Startup v. Macdonald* (v): "The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purported to be." As to what are proper time and place, see secs. 46-49, below.

Offer must not be of part only.—With regard to the validity of an offer of performance, it must be not only unconditional, but entire that is, it must be an offer of the whole payment or performance that is due (w).

It has been held by the High Court of Calcutta that a creditor is not bound to accept a sum smaller than he is entitled to and therefore the tender of such a sum does not stop interest running on it (x).

A creditor is not bound to accept less than is actually due and payable and therefore by refusing to accept only a portion of the principal he cannot lose his right to interest on that portion where interest is otherwise payable. A so-called tender of less than the debtor admits to be due is not a tender at all, but an offer of payment on account, which the creditor may accept or not, and risks nothing, in point of law, by not accepting, though it is often, in point of fact, unwise not to take what one can get. He may take the debtor's offered payment without prejudice to his claim, such as it may be, to a further balance. The debtor is entitled to a receipt for what he pays, but not to a release. A tender will be vitiated by the addition of any terms

(v) (1843) 5 Man & G. 593, 610; judgment of Rolfe, B.

(w) *Dixon v. Clark* (1848) 5 C. B. 366.

(x) *Walson & Co. v. Dhonendra Chunder Mookerjee* (1877) 3 Cal. 6, 16.

which amount to requiring the creditor to accept the sum offered in full satisfaction, or to admit in any other way that no more is due.

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Offer must be unconditional.—"The person making a tender has a right to exclude presumptions against himself by saying: 'I pay this as the whole that is due': but if he requires the other party to accept it as all that is due, that is imposing a condition; and, when the offer is so made, the creditor may refuse to receive it as a tender" (y).

A tender of debt before the due date is not a valid tender, and will not prevent interest from running on the loan (z).

Able and willing.—Sub-sec. (2) provides that the tender must be made under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. A tender of money in payment must be made with an actual production of the money (a). A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual (b).

On a contract for the sale and purchase of Government paper providing for its delivery on a certain date, it is not necessary for the seller to prove that he took the paper to the purchaser's place of business and made an actual tender then and there. It is sufficient that the seller was ready and willing to deliver on that date and did his best to inform the purchaser by going to his place of business on that date (c). Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares, and the issue as to readiness and willingness is in such a case immaterial (d).

Reasonable opportunity.—A tender of goods must be so made that the person to whom the goods are offered has a reasonable time to ascertain that the goods offered are goods of the quality contracted for. A tender

(y) *Bowen v. Owen* (1847) 11 Q. B. 130, 136, per Erle, J.; *Sati Prosad v. Monmotha Nath* (1913) 18 C.W. N. 84.

(z) *Eshakuq Molla v. Abdul Bari Haldar* (1904) 31 Cal. 183.

(a) * A mere offer by post to pay the amount due is not a valid tender *Veerayya v. Sivayya* (1914) 27 Mad. L.J. 482.

(b) *Haji Abdul Rahman v. Haji Noor*

Mahomed (1891) 16 Bom. 141, at pp. 149-150; *Sabapathy v. Vanmahalinga* (1915) 33 Mad. 959, at p. 970; *Rakhal Chandra v. Baikuntha Nath* (1928) 32 C. W. N. 1082, ('28) A. C. 874.

(c) *Juggernath Sew Bux v. Ram Dyal* (1883) 9 Cal. 791.

(d) *Dayabhai Dipchand v. Maniklal Vrijbhukan* (1871) 8 B. H. C. A. C. 123.

- S. 38** made at such a late hour of the appointed day that the buyer has no time to inspect them is not good (e).

Reasonable opportunity of inspection is all that the Act requires: it is the receiving party's business to verify, not the delivering party's to supply further proof that the goods are according to contract. The goods need not be in the delivering party's actual possession; control is enough (f).

Tender of money.—A creditor is not bound to accept a cheque; but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender. Downright refusal by the creditor to accept payment at all precludes any subsequent objection to the form of the tender (g).

Offer to one of several joint promisees.—A tender of rent by a lessee to one of several joint lessors (h) and of a mortgage debt by a mortgagor, to one of several mortgagees (i) would be a valid tender under this section.

Validity of discharge by one of several joint promisees.—In *Barber Miran v. Ramana* (j), it was held by the High Court of Madras that this section does not make it incumbent on the debtor to satisfy all the joint promises before obtaining a complete discharge, and therefore a release of a mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. This decision was based upon the English case of *Wallace v. Kelsall* (k). The correctness of this decision has been doubted in a number of cases (l). The correct view seems to be that a mere tender of a money debt to one of the joint creditors does not discharge the debt; the material section of the Contract Act, as regards the right to give a discharge in the name of joint debtors, is not sec. 38 but sec. 45. It must not be overlooked that in English law the rule that payment to one of joint creditors is a good discharge is still the general rule (m).

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| <p>(e) <i>Startup v. Macdonald</i> (1843) 6 Man. L. G. 593.</p> <p>(f) <i>Arunachalam Chettiar v. Krishna Aiyar</i> (1925) 49 Mad. L.J. 530.</p> <p>(g) <i>Venkatrama Ayyar v. Gopala-krishna Pillai</i> (1928) 52 Mad. 322, 90 I. C. 481, ('25) A. M. 1168, 116 I. C. 844, ('29) A. M. 230.</p> <p>(h) <i>Krishnarav v. Manaji</i> (1874) 11 B. H. C. 106. But payment to a partner in fraud of his co-partners is not a valid discharge: <i>Chinnaramanuja Ayyangar v. Padmanbha Pillaiyan</i> (1896) 19 Mad. 471.</p> | <p>(i) See <i>Barber Miran v. Ramana Goundan</i> (1897) 20 Mad. 461.</p> <p>(j) (1897) 20 Mad. 461. See <i>Shrinivasdas v. Meherbai</i> (1917) 41 Bom. 300, L. R. 44 I. A. 36.</p> <p>(k) (1840) 7 M. & W. 264.</p> <p>(l) <i>Sheik Ibrahim v. Rama Aiyar</i> (1911) 35 Mad. 685, 687; <i>Sitaram v. Shridhar</i> (1903) 27 Bom. 292, 294; <i>Hossainara v. Rahimannessa</i> (1910) 38 Cal. 342, at pp. 349-350.</p> <p>(m) <i>Powell v. Brodhurst</i> [1901] 2 Ch. at p. 164.</p> |
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In any case a payment to one of several joint creditors does not operate as a payment to them all where the payment is fraudulently made to him and not for the benefit of them all (n).

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39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence (o) in its continuance.

Effect of refusal of party to perform promise wholly.

Illustrations.

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

Refusal to perform contract.—As correctly laid down in the High Court of Calcutta, "this section only means to enact what was the law in England and the law here before the Act was passed, viz., that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind it" (p). English authorities are collected in the notes to *Cutter v. Powell* in Smith's Leading Cases (q).

The words used by Garth, C. J., "where a party to a contract refuses altogether to perform his part of it," clear up a slight verbal ambiguity in the Act, where the words "his promise in its entirety" mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety"; but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents

(n) *Sheik Ibrahim v. Rama Aiyar* (1911) 35. Mad. 685.

(o) *See Boulton Bros. & Co. v. New Victoria Mills Co.* (1928) 26 All.

L.J. 1119, 119 I.C. 837, (29) A.A. 87.

(p) Per Garth, C. J., in *Sooltan Chund v. Schiller* (1878) 4 Cal. 252, 255.

(q) Vol. ii at p. 10, 12th edn.

- S. 39 the promisee from getting in substance what he bargained for. It must be shown that the refusal is absolute and that the party to the contract had made quite plain his intention not to perform the contract (r).

The leading case on this subject is *Withers v. Reynolds* (s). The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October, 1829, to Midsummer, 1830, in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January, 1830, the straw having been regularly sent in, and the plaintiff being in arrear with his payments, "the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand." The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery. The Court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke, J. (as he was then, afterwards better known as Baron Parke), said, "the substance of the agreement was that the straw should be paid for on delivery.... When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him."

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, to "evinced an intention not to be bound by the contract" (t). Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach.

In *Sooltan Chund v. Schiller* (u) the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery. Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum of Rs. 1,000

(r) *Master v. Garret and Taylor Ltd.*
(1936) 131 I. C. 220, ('31) A.R.
126.

(s) (1831) 2 B. & Ad. 882.

(t) *Freeth v. Burr* (1874) L. R. 9 C. P.
213, 214.

(u) (1878) 4 Cal. 252; *Burn & Co. v. Thakur Saheb Sree Lukdirjee* (1923) 28 C. W. N. 104, a case on rather similar lines; *Volkart Bros. v. Rutna Velu Chetti* (1894) 18 Mad. 63.

was paid on account by the plaintiffs, which left a large balance due to the defendants in respect of linseed already delivered. This balance was not paid, and the defendants thereupon wrote to the plaintiffs cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered expressing their willingness to pay on adjustment of a sum which they claimed for excess refraction (i.e. excess of impurities) and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed and sued the defendants for damages for non-delivery of the remaining linseed. Upon these facts it was held, that there was no refusal on the part of the plaintiffs to pay for the linseed delivered to them, as they were willing to pay the sum due as soon as their cross-claims were adjusted.

It may be further observed, with regard to the illustrations, that it would be rash to extend them. In England it has been held that a singer engaged to perform in concerts as well as in operas who has agreed, amongst other things, to be in London six days before the beginning of his engagement, for the purpose of rehearsal, does not, merely by failing to be in London at the time so named, entitle the manager to put an end to the contract (v). Wrongful dismissal of an employee has, on the other hand, been held to determine not only the contract of service, but a term restraining the employee from carrying on the same business after its termination (w).

The principles set forth above were applied by the High Court of Calcutta in a case where the plaintiff had agreed to purchase from the defendant 300 tons of sugar, "the shipment [to] be made during September and October next in lots of about 75 tons in a shipment," the terms as to payment being cash before delivery. Notice of the arrival of the September shipment was given to the plaintiff, and he was called upon to pay before delivery. The plaintiff was unable to pay, and asked for time, but the defendant declined, and ultimately wrote to the plaintiff stating that he had cancelled the contract. On the arrival of the October shipment the plaintiff tendered payment for the same, but the defendant refused to accept the money, saying that the contract had been cancelled. The plaintiff thereupon sued the defendant for damages for refusing to deliver the October shipment. It was held, in accordance with the English authorities, that mere failure on the part of the plaintiff to pay for and take delivery of the September shipment did not amount to "a refusal" to perform the contract within the meaning of this section so as to entitle the defendant to rescind the contract, and that it did not exonerate him from delivering the October shipment (x).

(v) *Bellini v. Gye* (1876) 1 Q.B.D. 183.
 (w) *General Bill Posting Co. v. Atkinson*
 [1909] A. C. 118.

(x) *Rash Behary Shaha v. Nritya Gopal Nundy* (1906) 33 Cal. 477.

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The section is not confined to anticipatory breaches. It includes breaches before as well as after the time when the contract is to be performed. If the promisee takes no action on a repudiation before date of performance it is open to the promisor to change his mind and perform (y). See note "Anticipatory Breach" below.

A buyer who has refused to receive goods on the ground that they were not tendered within the agreed time cannot afterwards change his ground and raise the objection that in fact the goods were not according to contract (z); for the election to rescind, once made, is conclusive (a).

"Disabled himself from performing."—Disability due to the party's own fault must be distinguished from inability to perform a contract. It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach (b).

"Promisee may put an end to the contract."—The common law rights of a promisee on refusal by the promisor to perform his promise were thus stated by Scotland, C. J., in a Madras case (c) of 1863, and the statement remains applicable under the Act:—

"If a vendor contract to deliver goods within a reasonable time, payment to be made on delivery, and before the lapse of that time, before the contract becomes absolute, he says to the purchaser, 'I will not deliver the goods,' the latter is not thereby immediately bound to treat the contract as broken, and bring his action. The contract is not necessarily broken by the notice. That notice is, as respects the right to enforce the contract, a perfect nullity, a mere expression of intention to break the contract, capable of being retracted until the expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action unless, of course, the purchaser thereupon exercises his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained."

Anticipatory breach.—The case of *Hochster v. De la Tour* (d) is now generally treated as the leading one on "anticipatory breach of contract."

- (y) *Phul Chand Fateh Chand v. Jugal Kishore Gulab Singh* (1927) 8 Lah. 501, 106 I. C. 10, ('27) A. L. 693.
 (z) *Nannier v. Rayalu Iyer* (1925) 40 Mad. 781, 93 I. C. 673, ('26) A. M. 778. But as to a case where the vendor was not ready and willing to perform at all, see *British and Beningtons v. N. W. Cachar Tea Co.* [1923] A. C. 48, per Lord Sumner, at p. 70.
 (a) See *Narasimha Mudali v. Narayanaswami Chetty* (1925) 49 Mad.

- L.J. 720, 92 I. C. 333, ('26) A. M. 118, op. *Jawahar Singh v. Secy. of State* (1926) 8 Lah. L. J. 114, 94 I. C. 635, ('26) A. L. 292.
 (b) Pollock on Contract, 294.
 (c) *Mansuk Das v. Rangayya Chetti* 1. M. H. C. 162. See also the observations of Mulla, J., in *Steel Brothers & Co., Ltd. v. Dayal Khatalo & Co.* (1923) 47 Bom. 924, a case of a contract on c.i.f. terms.
 (d) 2 E. & B. 678.

The rule shortly indicated by this phrase is that on the promisor's repudiation of the contract, even before the time for performance has arrived, the promisee may at his option treat the repudiation as an immediate breach, putting an end to the contract for the future and giving the promisee a right of action for damages. It must be remembered that the option is entirely with the promisee.

The law on the subject of "anticipatory breach" may be summed up as follows (e) :—

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting end to the contract, and may at once bring his action as on a breach of it: and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." See notes to illustration (h) to section 73. When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting (f).

If the promisee does not treat the repudiation as an immediate breach and elects to keep the contract alive, the repudiation is a *brutum fulmen* and the parties are left with their rights and liabilities as before; and if performance by the promisor is subject to a condition precedent, the promisee has no right of action till that condition is fulfilled (g).

The election of the plaintiff to treat repudiation of the contract as an immediate breach does not affect the measure of damages.

Contract of service.—The illustrations to the section are both examples of contracts of service. In *Hochster v. De la Tour* (h) the defendant engaged the plaintiff as his courier on a Continental tour from June 1 for three

(e) *Frost v. Knight* (1872) L.R. 7 Ex. 111; *Ratanlal v. Brijmohan* (1931) 33 Bom. L.R. 703, 133 I.C. 861, ('31) A.B. 386.

(f) *Jhadoo Mal Jagan Nath v. Phul Chand Fateh Chand* (1924) 5 Lah.

497, 98 I.C. 118, ('25) A.L. 217.

(g) *Edridge v. R. D. Sethna* (1933) 60 I.A. 368, 58 Bom. 101, 36 Bom. L.R. 127, 146 I.C. 739, ('33) A.P.C. 233.

(h) (1853) 2 E. & B. 678.

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months certain at £10 a month. Before that day came the defendant changed his mind and wrote to the plaintiff that he did not want him. The plaintiff, without waiting further and before June 1, sued the defendant for breach of contract. For the defendant it was argued that the plaintiff should have waited till June 1 before bringing his action, on the ground that the contract could not be considered to be broken till then. It was held, however, that the contract had been broken by express renunciation, and the plaintiff was not bound to wait until the day of performance.

Where a servant or a clerk who is engaged by the month leaves his employer's service wrongfully in the course of the then current month, he is not entitled to any salary for the broken portion of the month in the course of which he left the service (i).

Measure of damages.—The measure of damages for "anticipatory breach" is not necessarily the same as it would be for a failure or refusal occurring at the time when the performance was due (j). The plaintiff is entitled to measure his damages as they stand at the date of repudiation: *Ramgopal v. Dhanji Jadhavji Bhatia* (1928) 55 I. A. 299.

By whom Contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Person by whom
promise is to be
performed.

Illustrations.

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Personal contracts.—Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what

- (i) *Ramji v. Little* (1873) 10 Bom. H. C. 57; *Dhume v. Sevenoaks* (1886) 13 Cal. 80; *Ralli Bros. v. Ambika Prasad* (1913) 35 All.

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- (j) *Millett v. Van Heek & Co.* [1921] 2 K. B. 369 C. A.

is an adequate performance of a personal contract. A contract for personal agency or other service entered into with partners is generally determined by the death of a partner. On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example, a contract to perform at a music-hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party (*k*). Every case must really be judged on its own circumstances.

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Ordinary contracts for delivery of goods, payment for them and the like, may, of course, be performed by deputy (*l*). "There is clearly no personal element in the payment of the price" (*m*).

Effect of accepting
performance from third
person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of joint
liabilities.

This is a deliberate variation of the Common Law rule. In England "upon the death of one of several joint contractors the legal liability under the contract devolves on the survivors; and the representatives of the deceased cannot be sued at law either alone or jointly with the survivors. Consequently the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives" (*n*). Parties can, of course, make their contracts what they please; but the presumption established for British India by the present section appears to be more in accordance with modern mercantile usage.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Any one of joint
promisors may be
compelled to perform.

(*k*) *Phillips v. Alhambra Palace Co.*
[1901] 1 K.B. 59.

(*l*) *Tod v. Lakhmidas* (1892) 16 Bom.
441, 451; followed *Yaman v.*
Changi (1925) 49 Bom. 862, 27

Bom. L.R. 1261, 91 I.C. 360, ('26)
A.B. 97.

(*m*) *Tolhurst v. Associated Portland
Cement Manufacturers* [1902] 2
K.B. 660, 672.

(*n*) *Leake*, 303.

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Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Sharing of loss by default in contribution.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a) *A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.*

(b) *A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.*

(c) *A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.*

(d) *A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.*

Joint Promisors.—The series of sections now before us materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts (o). As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several (p). It allows a promisee to sue such one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co-promisors (q). Here the minority of one joint promisor does

(o) *Lukmidas Khimji v. Purshotam Haridass* (1882) 6 Bom. 700, 701.

(p) *Motilal Bechardass v. Ghellabhai Hariram* (1892) 17 Bom. 6, 11 ; *Raghunath Das v. Baleshwar Prasad* (1928) 7 Pat. 353, 105 I.C. 424, ('27) A.P. 426.

(q) *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (1878) 3 Cal. 353, 360 ; *Muhammad Askari v. Radhe Ram Singh* (1900) 22 All. 307, 315 ; *Dick v. Dhunji Jaitha* (1901) 25 Bom. 378, 386.

not affect the liability of the other (r). There is still considerable difference of opinion in the Indian High Courts as to its consequential operation where a judgment has been obtained against some or one of joint promisors, and the decisions must be examined. We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in British India, to be held a bar to a subsequent action against the other promisor or promisors.

Effect of decree against some only of joint promisors.—In *Hemendro Coomar Mullic v. Rajendro Lal Moonshee* (s) the High Court of Calcutta held, following the rule laid down in *King v. Hoare* (t) that a decree obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against others. This was followed by the High Court of Madras in a similar case in *Gurusami Chetti v. Samurti Chinna* (u). Strachey, C. J., dissented from these decisions in *Muhammad Askari v. Radhe Ram Singh* (v). In that case the question was whether a judgment obtained against some of several mortgagors and remaining unsatisfied against them was a bar to a second suit against other joint mortgagors, and the Court held that it did not constitute any bar and that a second suit was maintainable, as the doctrine of *King v. Hoare* (w) was not applicable in India, at all events in the Mufassal, since the passing of the Indian Contract Act. Until the decision of Strachey, C. J., has been adopted by the other High Courts, or confirmed by the Judicial Committee of the Privy Council, the point must be regarded as open.

The applicability to India of the rule in *King v. Hoare* was considered by the High Court of Bombay in *Dick v. Dhunji Jaijha* (x), but the point was not decided, as the Court thought it did not arise directly for decision. In a case (y) where the question was whether the plaintiff having sued an agent to judgment was entitled under sec. 233 (below) subsequently to maintain a suit against the principal, Macleod, J., expressed his dissent both from the reasoning and the decision of Strachey, C. J., in *Muhammad Askari's* case and held that the present section merely took away the right of a joint promisor to have his co-promisor joined with him in the action, and did not enable the promisee to file separate actions against both. "It could not have been intended," said the learned Judge, "to deprive the second co-contractor of his right to plead the previous judgments, or to split up

- (r) *Jamna Bai v. Vasant Rao* (1916) 43 I.A. 99, 39 Mad. 409; *Sain Das v. Ram Chand* (1923) 4 Lah. 334, 85 I.C. 701, ('24) A.L. 146.
 (s) (1878) 3 Cal. 353.
 (t) (1844) 13 M. & W. 494.
 (u) (1881) 5 Mad. 37.

- (v) (1900) 22 All. 307. See also *Abdul Aziz v. Basdeo Singh* (1912) 34 All. 604, 606.
 (w) (1844) 13 M. & W. 494.
 (x) (1901) 25 Bom. 378.
 (y) *Shivlal v. Birdichand* (1917) 19 Bom. L. R. 370, 377-380.

S. 43 one cause of action into as many causes of action as there were joint contractors." This view was soon afterwards adopted by Kajiji, J. (z).

Suit against one of several partners.—In *Lukmidas Khimji v. Purshotam Haridas* (a), it was held in a suit brought upon a contract made by a partnership firm that a plaintiff may select as defendants those partners of the firm against whom he wishes to proceed. This decision was cited with approval by Farran, C.J., in *Motilal Bechardass v. Ghellabhai Hariram* (b) and was followed by the High Court of Madras in *Narayana Chetti v. Lakshmana Chetti* (c), where it was held in a similar case that according to the law declared in sec. 43 of the Contract Act, it is not incumbent on a person dealing with partners to make them all defendants, and that he is at liberty to sue any one partner as he may choose. The same view of the section has been taken by the High Court of Lahore (d).

Co-heirs.—This section speaks of two or more persons making a joint promise, and it has no application where parties become jointly interested by operation of law in a contract made by a single person. Hence the section does not apply to the case of several heirs of the original debtor, and they all must be joined as parties to the suit (e).

Contribution between joint promisors.—This clause represents the doctrine of English equity as distinct from that of the Common Law Courts.

Joint tenants are joint promisors; therefore the liability is only to contribute to the performance of the promise. Hence if one of several persons jointly liable for a debt is sued and is compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, but not in respect of the costs (f).

When liability to contribute arises.—In a case decided before the enactment of the Contract Act, it was held that the mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors. "Until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call

(z) *Markandrai v. Virendrarai* (1917) 19 Bom. L. R. 837, 843.

(a) (1882) 6 Bom. 700.

(b) (1892) 17 Bom. 6, 11.

(c) (1897) 21 Mad. 256. See also *Appa Dada Patil v. Ramkrishna Vasudku* (1930) 53 Bom. 652, 31 Bom. L.R. 1187, 121 I.C. 581, ('30) A.B. 5.

(d) *Muhammad Ismail Khan v. Saad-ud-din Khan* (1927) 9 Lah. 217; 104 I.C. 700, ('27) A.L. 819;

Liquidator, Union Bank of India v. Gobind Singh (1923) 4 Lah. 239, 77 I.C. 338, ('24) A.L. 148 (partners).

(e) *Shaikh Sahad v. Krishna Mohan* (1916) 24 Cal. L.J. 371.

(f) *Punjab v. Petum Singh* (1874) 6 N.W.P. 192; *Suryanarayana v. Rajalingam* (1933) 144 I.C. 726, ('33) A.M. 382.

upon them to share with him" (g). And the law under the Contract Act would appear to be the same : see the illustrations to the section (h).

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44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors ; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint promisor.

We have here another variation of English law (i). In England the releasing creditor must expressly reserve his rights against the co-debtors if he wishes to preserve them.

This section applies equally to a release given before or after breach. Thus where in a suit (j) for damages against several partners the plaintiff compromised the suit with one of them, and undertook to withdraw the suit as against him, it was held that the release did not discharge the other partners and the suit might proceed as against them.

The principle of this section has also been applied to judgment debts. It has thus been held that a release by a decree holder of some of the joint judgment debtors from liability under the decree does not operate as a release of the other judgment debtors (k).

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Devolution of joint rights.

Illustration.

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

- (g) *Ram Pershad Singh v. Neerbhoy Singh* (1872) 11 B. L. R. 76.
(h) See *Abraham v. Raphial* (1916) 39 Mad. 288, 291.
(i) See *Krishna Charan v. Sana Kumar* (1917) 44 Cal. 162, 174.

- (j) *Kirtee Chunder v. Struthers* (1878) 4 Cal. 336.
(k) *Mool Chand v. Alwar Chetty* (1916) 39 Mad. 548; *Daulat v. P. N. Bank* (1933) 144 I.C. 981, ('33) A.L. 505.

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Promise to two or more persons jointly.—This section applies to all joint promisees whether they be partners (l), co-sharers (n), or members of a joint Hindu family carrying on business in partnership (n). In a case where the owner of a *single* right dies, and several persons become entitled to it, it has been held that all of them must join in a suit to enforce the right, and if any of them refuses to join as plaintiff, he must be added as a defendant (o). Obviously joint promisees cannot divide the debt among themselves and sue severally for the portions (p).

Right to performance of promisees during joint lives.—As the right to claim performance of a promise in the case of joint promisees rests with them all during their joint lives, it follows that all the joint promisees, should sue upon the promise (g). Therefore, if a suit, is brought by some of them only, and the other promisees are subsequently added as plaintiffs whether on objection taken by the defendant (r) or by the Court of its own motion (s), the whole suit will be dismissed if it is at that time barred by limitation as regards the other promisees.

Suit by a surviving partner.—The general rule of English law is (contrary to the present section) that joint contracts are enforceable by the survivors or survivor alone. There is an equitable exception, founded on mercantile custom, as to debts due to partners; but even in this case "although the right of the deceased partner devolves on his executor, . . . the remedy survives to his co-partner, who alone must enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased" (t). The present section extends the mercantile rule of substantive right to all cases of joint contracts. It seems to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased (u).

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| <p>(l) <i>Motilal v. Ghellabhai</i> (1892) 17 Bom. 6, 13; <i>Aga Gulam Husain v. A. D. Sassoon</i> (1897) 21 Bom. 412, 421.</p> <p>(m) <i>Ramkrishna v. Ramabai</i> (1892) 17 Bom. 29.</p> <p>(n) <i>Kalidas v. Nathu Bhagvan</i> (1883) 7 Bom. 217; <i>Ram Narain v. Ram Chunder</i> (1890) 18 Cal. 86; <i>Alagappa Chetti v. Vellian Chetti</i> (1894) 18 Mad. 33.</p> <p>(o) <i>Ahinsa Bibi v. Abdul Kader</i> (1902) 25 Mad. 26, 35; <i>Mahamed Ishaq v. Sheikh Akramul Huq</i> (1908) 12 C. W. N. 84, 86, 93.</p> <p>(p) <i>Siluvaimuthu Mudaliar v. Muham-mad Sahul</i> (1926) 51 Mad. L.J. 648, 98 I.C. 549, ('27) A.M. 84.</p> | <p>(g) <i>Dular Chand v. Balram Das</i> (1877) 1 All. 453; <i>Vyankatesh Oil Mill v. Velmahomed</i> (1927) 30 Bom. L.R. 117, 109 I.C. 99, ('28) A.B. 191.</p> <p>(r) <i>Ramsebuk v. Ramlall Koondoo</i> (1881) 6 Cal. 815; <i>Fatmabai v. Pirbhai</i> (1897) 21 Bom. 580.</p> <p>(s) <i>Imam-ud-din v. Liladhar</i> (1892) 14 All. 524; <i>Ram Kinkar v. Akhil Chandra</i> (1908) 35 Cal. 519.</p> <p>(t) <i>Williams on Executors</i>, 11th ed. 638.</p> <p>(u) <i>Motilal v. Ghellabhai</i> (1892) 17 Bom. 6; <i>Vaidyanatha Ayyar v. Chin-nasami Naik</i> (1893) 17 Mad. 18; <i>Ugar Sen v. Lakhmichand</i> (1910) 32 All. 638; <i>Mool Chand v. Mul Chand</i> (1923) 4 Lah. 142, 71 I.C. 951, ('23) A.L. 197.</p> |
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Deceased partner's estate.—The High Court of Bombay has decided, after full examination of the rule and the present section of the Act in the light of both Indian and English authorities, that where a partner has died before the commencement of a suit against the firm, the rule does not enable the Act to make the deceased partner's separate estate liable without adding his legal representatives as "parties" (v).

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Suit by representative of deceased partner.—The representative of the estate of a deceased partner may maintain a suit for the recovery of a partnership debt, and may join the surviving partners as defendants in the suit where they refuse to join as plaintiffs (w).

Time and Place for Performance.

46. Where, by the Contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no application is to be made and no time is specified.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

Reasonable time.—As to what is 'reasonable time,' the following decisions may be noted: Where the defendants agreed to supply coal to the plaintiffs from time to time, as required by the defendants, on reasonable notice given to them, a notice given by the plaintiffs on the 22nd July, 1898, for the supply of 2,648 tons of coal on or before 31st August, 1898, was held not to be reasonable (x). Where the defendant agreed to discharge a debt due by the plaintiff to a third party and in default to pay to the plaintiff such damages as he might sustain, and no time was fixed for the performance of the obligation, it was held that the failure of the defendant to perform it for a period of three years amounted to a breach of the contract, as that was a sufficient and reasonable time for performance (y).

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance of promise where time is specified and no application to be made.

- (v) *Mathuradas v. Ebrahim Fazalbhoj* (1927) 51 Bom. 986, 29 Bom. L.R. 1296, 105 I.C. 305, (27) A.B. 581.
(w) *Aga Gulam Husain v. A. D. Sassoon* (1897) 21 Bom. 412, 421.

- (x) *The Bengal Coal Co., Ltd. v. Homee Wadia & Co.* (1899) 24 Bom. 97, 104.
(y) *Subramanian v. Muthia* (1912) 35 Mad. 639.

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Illustration.

A promises to deliver goods at *B*'s warehouse on the 1st January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Application for performance on certain day to be at proper time and place.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

The proper place will, of course, be the place named in the contract, if any.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of promise where no application to be made and no place fixed for performance.

Illustration.

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Rule of Common Law.—In the Common Law the rule as to money payments is that, if no place is named, the debtor is bound to find the creditor, provided he is within the jurisdiction (z), but if the obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them. The present section lays down a reasonable rule for all cases without distinction (a). The words “no place is fixed” do not exclude any inference the Court may draw as to the intention of the parties from the nature and circumstances of the contract, especially where the obligation is to pay money (b).

(z) See *Haldane v. Johnson* (1853) 8 Ex. 689; *Kedarmal Bhuramal v. Surajmal Govindram* (1907) 9 Bom. L. R. 903, at p. 911. See *Bansilal v. Gulam* (1926) 53 I.A. 58, 53 Cal. 88, 92 I.C. 760, ('25) A.P.C. 290.
(a) *Soniram Jeethmul v. R. D. Tata & Co.* (1927) 54 I.A. 265, 269, 5 Rang. 451, 29 Bom. L.R. 1027, 102 I.C. 610, ('27) A.P.C. 156.

(b) *Raman Chettiyar v. Gopalachari* (1908) 31 Mad. 223, at p. 228; *Nathubhai Ranchhod v. Chhabildas Dharamchand* (1935) 59 Bom. 365, 37 Bom. L.R. 357, 157 I.C. 248, ('35) A.B. 283; *Tuljaram v. Wadhmal* (1933) 142 I.C. 844, ('33) A.S. 62; *Bhagauti v. Chandrika Prasad* (1933) 150 I.C. 289, ('33) A.A. 147.

Place of delivery.—Where by an agreement for the sale of goods it was stipulated that the goods were “to be delivered at any place in Bengal in March and April 1891,” and it was added, “the place of delivery to be mentioned hereafter,” the Judicial Committee held that the buyer had the right to fix the place, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable (b1).

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Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Payment to an agent, who to the debtor's knowledge had no authority to receive the payment, does not discharge the debtor (c)

Performance of Reciprocal Promises.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

Illustrations.

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods unless *B* is ready and willing to pay for the goods on delivery.

(b1) *Grenon v. Lachmi Narain Angur-wala* (1896) 24 Cal. 8, 23 I.A. 119.

(c) *Mackenzie v. Shib Chunder Seal* (1874) 12 B. L.R. 360.

S. 51 *B* need not pay for the goods unless *A* is ready and willing to deliver them on payment (*d*).

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Simultaneous performance.—This section expresses the settled rule of the Common Law. To understand the principle rightly, we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another. But the terms of a promise may express or imply conditions of many kinds; and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition. And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section.

{ Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise. In that case it is said to be a *condition precedent* to the right of action on the reciprocal promise.

Where the performances are intended to be simultaneous, as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concurrent conditions, and the promises to be dependent.

✓ Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness to perform it, are said to be independent.

In order to apply the rule of this section we must know whether the promises are or are not "to be simultaneously performed." This is a question of construction, depending on the intention of the parties collected from the agreement as a whole.

There is a distinct question from that of "condition precedent," namely, whether failure to perform some parts of a contract deprives the party in fault of any right to remuneration for that which he has performed, and entitles the other to put an end to the contract, or is only a partial breach

(d) *Chengravelu Chetty v. Akarapu Venkara & Sons* (1925) 49 Mad. L.J. 300, 86 I.C. 299, ('25) A.M. 971.

which leaves the contract as a whole still capable of performance. In dealing with cases of this kind it may be very difficult to ascertain the true intention of the parties. We have to "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for or whether it merely partially affects it and may be compensated in damages" (e).

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Waiver of performance.—The section does not, of course, give any special remedy to a party who has chosen to perform his part without insisting on the reciprocal performance which was intended to be simultaneous with his own, as where a seller of goods "for cash on delivery" chooses to deliver the goods without receiving the price (f).

Readiness and willingness.—If a party bound to do an act upon request is ready to do it when it is required, he will fully perform his part of the contract, although he might happen not to have been ready had he been called upon at some anterior period (g). But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, the vendor is exonerated from giving proof of his readiness and willingness to deliver the shares (h). Similarly as to goods, it is a still more elementary proposition that a vendor may be ready and willing to deliver without having the goods in his actual custody or possession; it is enough if he has such control of them that he can cause them to be delivered (i).

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods (j).

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Order of performance
of reciprocal promises.

- (e) Per Cur., *Bellini v. Gye* (1876)
1 Q. B. D. 183.
- (f) *Sooltan Chund v. Schiller* (1878) 4
Cal. 252.
- (g) *Jivraj Megji v. Poulton* (1865) 2
B. H. C. 253, 256.
- (h) *Dayabhai Dipchand v. Maniklal*

- Vrijbhukan* (1871) 8 B. H. C.
A. C. 123; *Zippel v. Kapur & Co.*
(1922) 139 I.C. 114, ('32) A. S. 9.
- (i) *Kanvar Bhan-Sukha Nand v. Ganpat
Rai Ram Jiwan* (1926) 7 Lah. 442,
94 I.C. 304, ('26) A.L. 318.
- (j) *Sooltan Chund v. Schiller* (1878) 4
Cal. 255.

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52, 53*Illustrations.*

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock in trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

Order of performance.—The undernoted case (*k*) is an instance of the order of performance being fixed by the nature of the transaction.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Liability of party preventing event on which contract is to take effect.

Illustration.

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

Impossibility created by act of party.—This is in substance the rule not only of the Common Law, but of all civilised law. No man can complain of another's failure to do something which he has himself made impossible. The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. A man agrees to sell standing wood; the seller is to cut and cord it, and the buyer to take it away and pay for it. The seller cords only a very small part of the wood, and neglects to cord the rest; the buyer may determine the contract and recover back any money he has paid on account.

"This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only" (*l*).

(*k*) *Edridge v. R. D. Sethna* (1933) 60 I.A. 368, 58 Bom. 101, 36 Bom. L.R. 127, 146 I.C. 739, ('33) A. PC.

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(*l*) *Giles v. Edwards* (1797) 7 T. R. 181.

✓ If the contract is between *A* and *B*, and *B* makes a default which prevents *A* from fulfilling a particular term or condition of the contract, *A* may treat that term or condition as fulfilled and require *B* to perform his part of the contract. On the other hand *A*'s non-fulfilment gives *B* no right to rescind or to take advantage of any agreed penalty provided by the contract.

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54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract, for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

Illustrations.

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builders' work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

Default of promisor in first performance.—This section completes the declaration of the principles explained under sec. 51. In practice the difficulty is to know whether the promises in the case in hand are or are not "such that one of them cannot be performed," etc. One way in which the test is expressed in English authorities, is that if a plaintiff has himself

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broken some duty under the contract and his default is such that it goes to the whole of the consideration for the promise sued upon, it is a bar to his suit, but if it amounts only to a partial failure of that consideration, it is a matter for compensation by a cross-claim for damages (m).

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time, in contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so (n).

Effect of acceptance of performance at time other than that agreed upon.

Time—when of essence of contract.—In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between

(m) See the observations of the Judicial Committee in *Oxford v. Provan* (1868) L. R. 2 P. C. 135, 156.

(n) "This clearly means that the promisee cannot claim damages for non-performance at the

original agreed time, not that he cannot claim damages for non-performance at the extended time": *Muhammed Habib Ullah v. Bird & Co.* (1921) L. R. 48 I. A. 175, 179.

vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction.

The Judicial Committee has observed (o) that this section does not lay down any principle, as regards contracts to sell land in India, different from those which obtain under the law of England. Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language (p); it may be inferred from what passed between the parties before, but not after, the contract is made. An option to repurchase (being an exceptional provision for the seller's benefit) must be exercised strictly within the time limited (q).

There is no place, however, in mercantile contracts for the presumption that time is not of the essence of the contract (r). This is especially so as to shipping contracts. As to the sale of goods, unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Generally it is to be observed that in modern business documents men of business are taken to mean exactly what they say. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (s). Parties to mercantile contracts, therefore, cannot rely upon the present section to save them from the consequences of unpunctuality. On a sale of goods notoriously subject to rapid fluctuations of market price, the time of delivery is of the essence (t).

Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being of the essence; and in case of unnecessary

- (o) *Jamshed v. Burjorji* (1916) L.R. 43 I. A. 26; *Mahadeo v. Narain* (1919-20) 24 C. W. N. 330; *Sadiq Hussain v. Anup Singh* (1923) 4 Lah. 327, 76 I. C. 91, ('24) A. L. 151; *Raghubir Das v. Sunder Lal* (1930) 11 Lah. 699, 131 I. C. 371, ('31) A. L. 205.
- (p) *Kishen Prasad v. Kunj Behari Lal* (1925) 24 All. L. J. 210, 91 I. C. 790, ('26) A. A. 278; *Burn & Co., Ltd. v. Thakur Sahib of Morvi State* (1925) 30 C. W. N. 145,

- 90 I. C. 52, ('25) A. P. C. 188.
- (q) *Samapuri Chettiar v. Sudarasana-chariar* (1919) 42 Mad. 802; *Maung Wala v. Maung Sluve Gon* (1923) 1 Rang. 472, 82 I. C. 610, ('24) A. R. 57.
- (r) *Reuter v. Sala* (1879) 4 C. P. Div. 239, 249, per Cotton, L. J.
- (s) Lord Cairns in *Bovis v. Shand* (1877) 2 App. Ca. at p. 403.
- (t) *Balaram, &c., Firm v. Govinda Chetty* (1925) 49 Mad. L. J. 200, 91 I. C. 257, ('25) A. M. 1232.

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delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end (u); and where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned, although no such notice has been given (v).

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something, which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise (w).

Illustrations.

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract on those occasions becomes void.

- (u) *Stickney v. Keeble* (1915) A. C. 386; *Steedman v. Drinkle* (1916) A. C. 275 (J. C.); *Muhammed Habib Ullah v. Bird & Co.* (1921) 48 I. A. 175, 43 All. 257.
(v) *Pearl Mill Co. v. Ivy Tannery Co.* (1919) 1 K. B. 78.

(w) The section does not, of course, enable a party to take advantage of impossibility caused by his own default: *Benarasi Prasad v. Mohiuddin Ahmad* (1924) 3 Pat. 581, 78 I. C. 723, (24) A. P. 586.

Impossibility in general.—This section varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions which English Courts have of late more and more tended to regard as matters of construction depending on the true intention of the parties. English authorities, therefore, can be of very little use as guides to the literal application of this section.

With regard to the first paragraph, the result is the same as in England. In the Common Law we may say that parties who purport to agree to the doing of something obviously impossible must be deemed not to be serious or not to understand what they are doing; also that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration. "Impossible in itself" seems to mean impossible in the nature of things. The case of performance being at the date of the agreement, impossible by reason of the non-existence of the subject-matter of the contract has been dealt with under the head of Mistake (s. 20).

The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words; there are conditions which may be implied from the nature of the transaction; and in certain cases where an event making performance impossible "is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made" (x), performance or further performance of the promise as the case may be, is excused. On this principle a promise is discharged if, without the promisor's fault, (1) performance is rendered impossible by law (x); (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced (y), or an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible (z); (3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure (a).

(x) *Baily v. De Crespigny* (1869) L. R. 4 Q. B. at p. 185.

(y) *Taylor v. Caldwell* (1863) 3 B. & S. 826; *Howell v. Coupland* (1876) 1 Q. B. Div. 258; *Kimjilal Monohardas v. Durgaprasad Debiprasad* (1919-20) 24 C. W. N. 703; *Gurdit Singh v. Secretary*

of State (1931) 130 I.C. 772, ('31) A. L. 347.

(z) *Krell v. Henry* [1903] 2 K. B. 740 C. A.; *Blackburn Bobbin Co. v. T. W. Allen & Sons* [1918] 2 K. B. 467 C. A.

(a) *Robinson v. Davison* (1871) L. R. 6 Ex. 269.

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Having regard to the unqualified language of the Act, it seems useless to enter at more length on the distinctions observed in English law. The illustrations do not, indeed, appear to go beyond English authority, but this cannot detract from the generality of the enacting words. *H* agreed to hire the use of *K*'s rooms in London on the days of 26th and 27th June, 1902, for the purpose of seeing the intended coronation processions. By reason of the King's illness no procession took place on either of those days. It was held that *K* could not recover the balance of the agreed rent, as the taking place of the processions "was regarded by both contracting parties as the foundation of the contract" (b). In India such a case would, perhaps, fall more appropriately under sec. 32.

Stoppage of work by strike.—A strike of the workmen employed in executing work under a contract does not of itself make performance impossible for the purpose of this section (c).

Frustration by total or partial prohibition.—In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful. This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation. In principle the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance, so far as the prohibition is not total, or when it is removed, would really be performance of the same contract. Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war, has been held to discharge the contractors (d). So, too, a contract to deliver goods may be frustrated by emergency regulations restricting transport (e). But a continuing contract is not discharged by a prohibitive regulation which may be determined or varied during the war and leaves a substantial part of the contract capable of execution (f).

"Becomes impossible."—The Indian decisions merely illustrate what amounts to supervening impossibility or illegality within the meaning of the second paragraph.

In a suit for damages for breach of a contract against a Hindu father to give his minor daughter in marriage to the plaintiff, it was held that the performance of the contract had not become impossible simply because the girl had declared her unwillingness to marry the plaintiff, and the defendant

(b) *Krell v. Henry* [1903] 2 K. B. 740.

(c) *Hari Laxman v. Secretary of State*
(1927) 52 Bom. 142, 30 Bom. L. R.
49, 108 I. C. 19, ('28) A. B. 61.

(d) *Metropolitan Water Board v. Dick
Kerr & Co.* [1918] A. C. 119.

(e) *Sannidhi Gundayya v. Subbayya*
(1926) 51 Mad. L. J. 663, 99 I. C.
459, ('27) A.M. 89.

(f) *Leiston Gas Co. v. Leiston-cum-
Sizewell Urban Council* [1916] 2
K. B. 428 A. C.

had declared that he could not compel her to change her mind (g). If a man chooses to answer for the voluntary act of a third person, and does not in terms limit his obligation to using his best endeavours, or the like, there is no reason in law or justice why he should not be held to warrant his ability to procure that act. An agreement to sell a specified quantity of *dhotis* to be manufactured at a particular mill "to be taken delivery of as and when the same may be received from the mills," cannot be read as meaning "if and when," especially when a time is named for the completion of delivery; and the failure of the mills to produce the goods is no excuse. The doctrine of frustration does not extend to the case of a third person on whose work the defendant relied preferring to work for some one else during the material time (h).

Commercial impossibility.—The impossibility referred to in the second clause of this section does not include what is called commercial impossibility. A contract, therefore, to supply freight cannot be said to become impossible within the meaning of that clause merely because the freight could not be procured except at an exorbitant price (i).

"Becomes unlawful."—By a contract made with the plaintiff the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiffs' ship. The pilgrims arrived in Bombay, but the defendants refused to receive them on board their steamer on the ground that during the voyage of the plaintiffs' ship to Bombay there had been an outbreak of small-pox on board and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had under the circumstances become unlawful, having regard to the provisions of sec. 269 of the Indian Penal Code (Act XLV of 1860). That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment. It was held that the carrying of the pilgrims in the defendants' steamer would not have been in contravention of any law or regulation having the force of law, and that if special precautions were necessary to prevent infection it was the duty of the defendants to take those precautions and to perform the contract (j).

Certain statutory enactments define the effect of the present section. The Specific Relief Act I of 1877, sec. 13, provides that, notwithstanding anything contained in sec. 56 of the Contract Act, a contract is not wholly

- (g) *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1896) 21 Bom. 23.
(h) *Hurnandrai Fulchand v. Pragdas Budhsen* (1922) 50 I. A. 9, 47 Bom. 344.

- (i) *Karl Ettlinger v. Chagandas* (1916) 40 Bom. 301, 310-311.
(j) *Bombay and Persia Steam Navigation Co., Ltd. v. Rubattino Co., Ltd.* (1889) 14 Bom. 147.

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and the creditor originally concurred. The same rule applies to payment of Government revenue (g).

Several distinct debts.—This section deals only with the case of several distinct debts, and does not apply where there is only one debt, though payable by instalments. Thus, where the amount of a decree was by consent made payable by five annual instalments, it was held that the decree-holder was not bound to appropriate the payments to the specific instalments named by the judgment debtor (r).

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Creditor's right to appropriate.—"If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor," and he may exercise that right until the very last moment, and need not declare his intention in express terms (s); he may, indeed, exercise that right even when he is being examined at the trial of the case (t). This is, no doubt, the rule of English law, and it was assumed to be the law under the Contract Act by the High Courts of Bombay, Madras and Patna (u). But the High Court of Allahabad has held that an appropriation of payment by the creditor must be made *at the time of receiving the money*, and that he cannot exercise the right of appropriation at the last moment (v). But the creditor may do nothing at all, in which case a rule is necessary for the guidance of the Courts, and sec. 61 provides such a rule. The rule laid down in sec. 61 is in conformity with the English law.

(g) *Mahomed Jan v. Ganga Bishun Singh* (1910) 38 Cal. 537, 38 I. A. 80.

(r) *Fazal Husain v. Jivan Ali* (1906) All. W.N. 135; followed, *Harkisondas v. Nariman* (1927) 29 Bom. L.R. 950, 104 I. C. 673, (27) A. B. 479.

(s) *Lord Macnaghten in Cory Bros. & Co. v. Owners of the "Mecca"* (1897) A.C. 286, 293; followed, *Manisty v. Jameson* (1925) 5 Pat. 326, 94 I. C. 273, (26) A. P. 330.

(t) *Seymour v. Pickett* (1905) 1 K.B. 715.

(u) *Amerchand & Co. v. Ramdas* (1914) 38 Bom. 255, 264-265 (the case was taken in appeal to the Privy Council [L. R. 43 I.A. 164; 40 Bom. 630], but the judgment of the High Court on this point was not challenged in argument); *Munisami Mudali v. Perumal Mudali* (1919) 37 Mad. L.J. 367; *Bishun Perkash v. Siddique* (1916) 1 Pat. L.J. 474.

(v) *Kundan Lal v. Jagannath* (1915) 37 All. 649.

Principal and interest.—Where there is a debt carrying interest, money paid and received without any definite appropriation is to be first applied in payment of interest (*w*). If the debtor appropriates a payment to principal, the creditor need not accept payment on those terms, but if he does not he must return the money; if he does accept he is bound by the appropriation (*x*).

✓ **Debt barred by the law of limitation.**—Where no appropriation is made by the debtor, the creditor may apply the payment to any lawful debt, though barred by the law of limitation. This frequently happens where there is a running account extending over several years. The creditor may in such a case appropriate the payments to the earliest items barred by limitation and may sue for such of the balance as is not so barred (*y*).

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Application of payment where neither party appropriates.

Scope of the section.—This section must be read continuously with sec. 60. It must be carefully observed that it does not lay down a strict rule of law, but only a rule to be applied in the absence of anything to show the intention of the parties. Not only any express agreement, but the mode of dealing of the parties, must be looked to. On the other hand, the circumstances may show that accounts which it was at a party's option to treat as separate were, in fact, treated as continuous, and then payments will be appropriated to the earliest unpaid item of the combined account (*z*).

Contracts which need not be performed.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Effect of novation, rescission and alteration of contract.

Illustrations.

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(*w*) *Venkatrati Appa Row v. Parthasarathi Appa Row* (1921) L.R. 48 I.A. 150, 153, 44 Mad. 570, 573.

(*x*) *Nemi Chand v. Radha Kishan* (1921) 1 L.R. 48 Cal. 839, 841.

(*y*) *Bishun Perkash v. Siddique* (1916) 1 Pat. L.J. 474.

(*z*) *Hooper v. Keay* (1876) 1 Q.B. Div. 178.

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(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.

Novation.—The meaning of “novation,” the term used in the marginal note to this section, and now the accepted catchword for its subject-matter, has been thus defined in the House of Lords: “that, there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes (*sic*) a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration” (*a*).

It has to be considered in every case not only whether a new debtor has consented to assume liability, but whether the creditor has agreed to accept his liability in substitution of the original debtor's. In some circumstances the creditor may be entitled to sue the retiring or the incoming partner in a firm at his option; mere continuing to deal with the firm as reconstituted will not preclude him from suing his original debtor (*b*). Novation is not consistent with the original debtor remaining liable in any form (*c*); it requires as an essential element that the right against the original contractor shall be relinquished, and the liability of the new contracting party accepted in his place (*d*). Therefore, if a new contracting party has been accepted, the onus of proving that the original party remains liable lies heavily on the person asserting it (*e*).

(a) Lord Selborne in *Scarf v. Jardine* (1882) 7 App. Ca. 345, 351.

(b) *Scarf v. Jardine* (1882) 7 App. Ca. 345, 351.

(c) See *Commercial Bank of Tasmania v. Jones* [1893] A.C. 313.

(d) *Nadimulla v. Channappa* (1903) 5 Bom. L. R. 617, Accordingly a

formal instrument is not annulled by a mere agreement to substitute something else for it at a future date: *Angan Lal v. Saran Behari Lal* (1929) 51 All. 799, 121 I.C. 221, ('29) A.A. 503.

(e) *Liladhar Nemchand v. Rawji Jugjiwan* (1935) 68 M. L. J. 530, 154 I.C. 1090 ('35) A. PC. 93.

Election to accept the sole liability by new or surviving partners in a firm does not need very strong proof, but merely ambiguous acts will not do. *A* advanced Rs. 50,000 to a firm consisting of three partners. The sum of Rs. 50,000 was made up partly of securities handed over by *A* to the firm and partly of cash. The firm passed a note to *A* promising to return the securities and repay the cash with interest at 6 per cent. per annum payable every six months. Thereafter one of the partners died, and *A* accepted from the surviving partners a promissory note in the firm's name for Rs. 50,000 to be paid in cash with interest at the same rate, but not payable with six monthly rests. This was a new contract with the surviving partners alone (*f*).

Whether or not there is a novation of a contract is in each case a question of fact (*g*). An attempted novation which fails to produce a new enforceable contract may put an end to the original contract if it was the intention of the parties to rescind it in any event. Such intention must be clearly proved (*h*).

Unauthorised alteration of documents.—What if the document recording an agreement is altered without the consent of both parties? No answer to this question is given by the Contract Act, or anywhere in the Anglo-Indian Codes, but Indian practice follows the authorities of the Common Law. The rule is that any material alteration in an instrument made by a party, or by any one while it is in the party's custody or in that of his agent, disables him from relying on it either as plaintiff or as defendant (*i*), though he may sue for restitution under sec. 65 (*j*). Any alteration is material which affects either the substance of a contract expressed in the document or the identification of the document itself, at all events where identification may be important in the ordinary course of business (*k*). Alterations are immaterial if they merely express what was already implied in the document, or add particulars consistent with the document as it stands, though superfluous, or are innocent attempts to correct clerical errors (*l*). There may be cases of wilful fraud practised by a stranger where the rule will not be held to operate against the person who had the custody of the document (*m*).

(*f*) *Markandrai v. Virendrarai* (1917)
19 Bom. L. R. 837, 843-844.

(*g*) *Roushan Bibee v. Hurray Kristo Nath* (1882) 8 Cal. 926; *Kshetranath Sikdar v. Harasukdas Bal Kissendas* (1926) 31 C. W. N. 703, 102 I.C. 871, (27) A.A. 538.

(*h*) *Morris v. Baron* [1918] A. C. 1; *British and Beningtons v. N. W. Cachar Tea Co.* [1923] A. C. 48, 68.

(*i*) *Suffell v. Bank of England* (1882)

9 Q. B. Div. 555, where authorities are collected

(*j*) *Anantha Rao v. Surayya* (1920) 43 Mad. 703.

(*k*) *Suffell v. Bank of England* (1882) 9 Q. B. Div. 555. A Bank of England note with the number altered is not substantially the same note.

(*l*) *Hougate and Osborn's Contract* [1902] 1 Ch. 451.

(*m*) *Louis v. Fox* (1887) 12 App. Ca. 206 at p. 217, per Lord Herschell.

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Indian decisions.—The Indian decisions on the subject may be divided into two classes. The first class comprises cases in which the suits were for bond debts brought upon the basis of altered documents. The second class relates to suits on documents which by the very execution thereof effect a transfer of interest in specific immovable property. As to the former class of cases, the Indian Courts have followed the principles of English law set out above, the point for decision in each case being whether the alteration was or was not material. Thus where a bond was passed to the plaintiff by one of three brothers, and the plaintiff forged the signature of the other two to the bond, and brought a suit upon it in its altered form against all the three brothers, it was held that the alteration avoided the bond (n). In such a case the plaintiff is not entitled to a decree even against the real executant. Similarly, where the date of a bond was altered from 11th September to 25th September, it was held that the alteration was material, as it extended the time within which the plaintiff was entitled to sue; it did not matter that the period of limitation, though reckoned from 11th September, had not expired at the date of the suit (o). But the fact that the signature of an attesting witness had been affixed after execution to a bond that does not require to be attested is not a material alteration, and does not make the bond void (p). Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim. A material alteration, therefore, in a written acknowledgment of debt does not render it inoperative, as the acknowledgment is merely evidence of a pre-existing liability (q).

We shall next consider the cases where the effect of the execution of the altered document is to create an interest in the property comprised in the document. The rule to be derived from these cases may be stated as follows: A material alteration, though fraudulent, made in a mortgage or hypothecation bond does not render it void for all purposes, and the altered document may be received in evidence on behalf of the person in whose favour it is executed for the purposes of proving the right, title or interest created by, or resulting from, the execution of the document, *provided that the suit is based on such right, and not on the altered document*. This rule is founded by Indian Courts on English decisions (r).

(n) *Gour Chandra Das v. Prasanna Kumar Chandra* (1906) 33 Cal. 812.

(o) *Govindasami v. Kuppusami* (1889) 12 Mad. 239; *Mt. Gomti v. Meghraj Singh* (1933) All. L. J. 907, 145 I.C. 147, (1933) A. A. 443.

(p) *Venkatesh v. Baba* (1890) 15 Bom. 44; *Ramayyar v. Shanmugam*

(1891) 15 Mad. 70.

(q) *Atmaram v. Umedram* (1901) 25 Bom. 616; *Harendra Lal Roy v. Uma Charan Ghosh* (1905) 9 C.W.N. 695.

(r) *Agricultural Cattle Insurance Co. v. Fitzgerald* (1851) 17 Q. B. 432. See the cases collected in *Mangal Sen v. Shankar* (1903) 25 All. 580.

In the case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from secs. 87-89 of the Negotiable Instruments Act XXVI of 1881.

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63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations.

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

Rule of the Common Law.—This section makes a wide departure from the Common Law. In England, to quote an authoritative exposition, "it is competent for both parties to an executory contract by mutual agreement, without any satisfaction, to discharge the obligation of that contract"; in other words, as reciprocal promises are a sufficient consideration for each other, so are reciprocal discharges. "But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment where the obligation is to be performed by payment"; but, by the law merchant, the obligation of a negotiable instrument may be discharged by mere waiver (s). The intention of the present section to alter the rule of the Common Law is clear, and has been recognized in several Indian cases (t).

(s) *Foster v. Dawber* (1851) 6 Ex. 839.

(t) *Monohur Koyal v. Thakur Das Naskar* (1888) 15 Cal. 319, 326;
Davis v. Cundasami Mudali

(1896) 19 Mad. 398, 402; *Naoroji v. Kazi Sidik* (1896) 20 Bom. 636, 644.

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Election to rescind.—The broad principle on which this and the following section rest, and which, as we have seen, is not confined to cases expressly included in either of them, was thus stated in England in one of the weightiest judgments of recent times :—

“No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it” (c).

For the same reason, a man cannot rescind a contract in part only. When he decides to repudiate it, he must repudiate it altogether. If he has put it out of his power to restore the former state of things, either by acts of ownership or the like, or by adopting and accepting dealings with the subject-matter of the contract which alter its character, as the conversion of shares in a company, or if he has allowed a third person to acquire rights under the contract for value (d), it is too late to rescind, and the remedy, if any, must be of some other kind.

✓ **Benefit received “thereunder.”**—The benefit to be restored under this section must be benefit received *under* the contract. *A* agrees to sell land to *B* for Rs. 40,000. *B* pays to *A* Rs. 4,000 as a deposit at the time of the contract, the amount to be forfeited to *A* if *B* does not complete the sale within a specified period. *B* fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. *A* is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received *under* the contract; it is a security that the purchaser would fulfil his contract, and is *ancillary* to the contract for the sale of the land (e).

65. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement or contract that becomes void.

Illustrations.

(a) *A* pays *B* 1,000 rupees in consideration of *B*'s promising to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the 1st May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the 1st May. He is bound to pay *A* for them.

(c) *Clough v. L. & N. W. R.* (1871)

L. R. 7 Ex. 26.

(d) *Clerk v. Dickson* (1858) E. B. & E.

148.

(e) *Natesa Aiyar v. Apparu* (1915) 38 Mad. 178.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

The illustrations to this section are rather miscellaneous. In (a) we have a simple case of money paid under a mistake (*cf.* s. 72). In (b) it does not seem that the contract has become void at all, but, on the contrary, that *B* has elected to affirm it in part, and dispense with the residue: there is no new contract under which he is bound to pay for the 130 maunds of rice, as is shown by this, that what he does accept he is undoubtedly bound to pay for at the contract price. In (c) it is not clear whether the contract is to be treated as divisible, so that *A* is entitled to Rs. 100 for each night on which she did sing, or the Court is to estimate what, on the whole, the partial performance was worth. Illustration (d) is simple; English lawyers would refer it to the head of money paid on a consideration which fails.

Scope of the section.—This section applies only to cases where an agreement is discovered to be void, or when a contract becomes void [see s. 2, cl. (j)]. It does not, therefore, apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. An insurance company is not, therefore, bound under the provisions of this section to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age (*f*). This section does not apply to a case where one of the parties—such as a minor known at the time so to be—being wholly incompetent to contract, there not only never was but there never could have been any contract (*g*).

Where an agreement is discovered to be void.—The expression “discovered to be void” presents some difficulty as regards agreements which are void for unlawful consideration [ss. 23 and 24]. It seems that the present section does not apply to agreements which are void under sec. 24 by reason of an unlawful consideration or object and there

- (f) *Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari* (1901) 25 Mad. 183, 214.
(g) *Mohori Bibee v. Dhurmodas Ghose*

(1903) 30 Cal. 539, L. R. 30 I. A. 114; *Punjabhai v. Bhagwandas* (1928) 53 Bom. 309, 31 Bom. L.R. 58, 117 I.C. 518, (29) A.B. 89.

S. 65 being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. According to that law money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon a failure of consideration. But if the illegal purpose or any material part of it has been performed, the money paid cannot be recovered back, for the parties are then equally in fault, and *in pari delicto melior est conditio possidentis* (h). This principle applies to cases where a person transfers his property *benami* to another in order to defraud his creditor. In such cases, where the fraudulent purpose is not carried into execution, the transferee will be deemed to hold the property for the benefit of the transferor, as provided by sec. 84 of the Trusts Act. Where, however, the fraudulent object is accomplished, the transferee will not be disturbed in his possession (i). The same principles have been held to apply to payments made under agreements which are void under sec. 30 as being by way of wager.

- ✓ A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void. So also the purchaser of an expectancy (j).
- ✓ In the absence of special circumstances (k) the time at which an agreement is discovered to be void is the date of the agreement (l).

“When a contract becomes void.”—The expression “becomes void” includes cases of the kind contemplated by the second clause of sec. 56, and is sufficient to cover the case of a voidable contract which has been avoided (m). It was deemed applicable by the High Court of Bombay (n) to the case of a lease which was terminated by the lessee under the provisions of the Transfer of Property Act on the destruction of the property by fire. In that case the plaintiff hired a godown from the defendant for a period of twelve months and paid the whole rent to him in advance. After about seven months the godown was destroyed by fire, and the plaintiff claimed a refund from the defendant of a proportionate amount of the rent, and subsequently brought

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| <p>(h) <i>Taylor v. Bowers</i> (1876) 1 Q. B. D. 291; <i>Kearley v. Thompson</i> (1890) 24 Q. B. D. 724; <i>Petherpermal v. Muniandi Serbai</i> (1908) 35 I. A. 98, at p. 103.</p> <p>(i) <i>Petherpermal v. Muniandi Servai</i> (1908) 35 I. A. 98; <i>Jadu Nath Poddar v. Rup Lal Poddar</i> (1906) 33 Cal. 967; <i>Girdharlal v. Manikamma</i> (1914) 38 Bom. 10.</p> <p>(j) <i>Harnath Kuar v. Indar Bahadur Singh</i> (1923) 50 I. A. 69, 45 All. 179. See also <i>Annada Mohan Roy v. Gour Mohan Mullick</i> (1923) 50 I. A. 239, 50 Cal. 929.</p> | <p>(k) <i>Harnath Kuar v. Indar Bahadur Singh</i> (1923) 50 I. A. 69, 45 All. 179.</p> <p>(l) <i>Hansraj Gupta v. Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co.</i> (1933) 60 I. A. 13, 54 All. 1067, 35 Bom. L. R. 319, 142 I. C. 7, ('33) A. PC. 63.</p> <p>(m) <i>Saigur Prasad v. Har Narain</i> (1932) 59 I. A. 147, 7 Luck. 64, 34 Bom. L. R. 771, 136 I. C. 108, ('32) A. PC. 89.</p> <p>(n) <i>Dhuramsey v. Ahmedbhai</i> (1898) 23 Bom. 15, followed in <i>Muhammad Hashim v. Misri</i> (1922) 44 All. 229.</p> |
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a suit for the same. The Court held that the plaintiff was entitled under view this section to recover the rent for the unexpired part of the term. A contract "becomes void" when a party disables himself from suing upon it by making an unauthorized alteration (o). The advantage is not recoverable unless it has been received before the contract becomes void (p).

Contracts with corporations.—At common law the contracts of corporations must in general be under seal. To this, however, there are some exceptions. One of them is where the whole consideration has been executed and the Corporation has accepted the executed consideration, in which case the corporation is liable on an implied contract to pay for the work done, provided that the work was necessary for carrying out the purposes for which the corporation exists (q). The exception is based on the injustice of allowing a corporation to take the benefit of work without paying for it (r). This exception, however, is in certain cases excluded by statute. Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as for instance, under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal, the fact that the consideration has been executed on either side does not entitle the party, who has performed his part to sue the other on an implied contract for compensation. This may work hardship, but the provision of the Act being imperative, and not merely directory, it must be complied with. The present section, accordingly, does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal corporation, and goods are supplied or the work done in pursuance of the contract, but the contract is required by the Act under which the Corporation is constituted to be executed in a particular form, and it is not so executed. In such cases (s) the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation. "The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer....The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement" (t). This

(o) *Anantha Rao v. Surayya* (1920) 43 Mad. 703.

(p) *Wolf & Sons v. Dadyba Khimji & Co.* (1920) 44 Bom. 631.

(q) *Lawford v. Billericay Rural District Council* [1903] 1 K. B. 772.

(r) *Clarke v. Cuckfield Union* (1852)

21 L. J. Q. B. 349, 351.

(s) *Young & Co. v. Corporation of Royal Leamington Spa* (1883) 8 App. Ca. 517.

(t) *Ibid.*, per Lord Bramwell, at p. 528. The "wafer" is the common modern substitute for a waxen seal.

S. 65 has been taken by the High Courts of Allahabad (u), Calcutta, (v) Madras (w) and Bombay (x). A different view has been taken in some cases (y), but it cannot be supported in view of the principle stated above. Just as a corporation cannot be sued upon a contract which is required to be, but which is not under seal, though the consideration has been executed for its benefit, so it cannot sue upon the contract, though it has performed its own part of the contract so that the other party has had the benefit of it (z). In *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong* (a) the Commissioners for the Port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract with him. The contract was not under seal as required by sec. 29 of the Chittagong Port Act, 1914. It was held that the Act was imperative in its terms and that the plaintiffs could not sue on the contract. It was held at the same time that the plaintiffs were entitled to payment upon a *quantum meruit*. Two of the English cases cited (b) lay down that where the provision of a statute as to the form of a contract is not imperative—but there only—either party may sue the other on an implied contract to pay for work done. It appears from the report of this case that counsel for the defendant (who was the appellant before the Court) himself conceded that the plaintiffs were entitled (though not in that suit) to some compensation for the use of the tug. It is submitted that both counsel and the Court were in error in thinking that the plaintiffs were entitled to recover *quantum meruit*. No question of payment upon a *quantum meruit* can arise where an Act is imperative (c).

At all events, where a contract which fails to comply with the statutory formalities is only executory, neither party can enforce performance against the other (d).

“Any person.”—The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage (e).

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| <p>(u) <i>Radha Krishna Das v. Municipal Board of Benares</i> (1905) 27 All. 592.</p> <p>(v) <i>Mohamad Ebrahim Molla v. Commissioners for the port of Chittagong</i> (1927) 54 Cal. 189, 210 seq. 103 I.C. ('27) A.C. 465.</p> <p>(w) <i>Srivilliputtur Municipal Commissioner v. Arunachala</i> ('33) A.M. 332, 144 I.C. 784.</p> <p>(x) <i>Municipal Corporation, Bombay v. Secretary of State</i> ('34) A.B. 277, (1934) 58 Bom. 660, 36 Bom. L.R. 568, 152 I.C. 947.</p> <p>(y) <i>Abaji Sitaram v. Trimbak Municipality</i> (1903) 28 Bom. 66.</p> <p>(z) <i>Raman Ohelli v. Municipal Council of Kumbakonam</i> (1907) 30 Mad.</p> | <p>290; <i>Mohamad Ebrahim Molla v. Commissioners for the Port of Chittagong</i> (1927) 54 Cal. 189, 210 et seq. 103 I.C. ('27) A.P.C. 465.</p> <p>(a) (1927) 54 Cal. 189 <i>supra</i>.</p> <p>(b) <i>Lawford v. Billericay Rural District Council</i> [1903] 1 K. B. 773; <i>Douglas v. Rhyl Urban District Council</i> [1913] 2 Ch. 407.</p> <p>(c) <i>Srivilliputtur Municipal Commissioner v. Arunachala</i> ('33) A.M. 332, 144 I.C. 784.</p> <p>(d) <i>Ahmedabad Municipality v. Sulemanji</i> (1903) 28 Bom. 618.</p> <p>(e) <i>Giraj Baksh v. Kazi Hamid Ali</i> (1886) 9 All. 340, 347.</p> |
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"Received any advantage."—In England, where a contract becomes impossible of performance by the destruction of the subject-matter or the failure of an event or state of things contemplated as the foundation of the contract to happen or exist (see on s. 56 above), the rule is that the parties are excused from further performance and acquire no rights of action, so that each must bear any loss or expense already incurred, and cannot recover back any payment made in advance (f). The present section appears to include such cases so far as they fall within sec. 56, and not to lay down any special rule with regard to them. It would seem, therefore, that the general rule of this section applies to such cases, and that, contrary to the English decisions, each party is bound to return any payment received.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Mode of communicating or revoking rescission of voidable contract.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

Illustration.

A contracts with *B* to repair *B*'s house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Refusal or neglect of promisee.—A case exactly in point is that of an apprentice, whom a master workman has undertaken to teach his trade, refusing to let the master teach him. "It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught" (g).

(f) *Appleby v. Myers* (1867) L. R. 2 Q. P. 651; *Civil Service Co-operative Society v. General Steam*

Navigation Co. [1903] 2 K. B. 756 C.A.

(g) *Raymond v. Minton* (1866) L. R. 1 Ex. 244.

CHAPTER V.

Of certain Relations resembling those created by Contract.

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68. If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessaries supplied to person incapable of contracting, or on his account.

Illustrations.

(a) *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

Minors.—Since the decision of the Judicial Committee in *Mohori Bibi v. Dhurmodas Ghose* (*h*) it is clear that this section applies to minors as well as to persons of unsound mind (see the illustrations) and others, if any, disqualified from contracting by any law to which they are subject.

"Necessaries."—Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are "necessaries" within the meaning of this section (*i*). And so are costs incurred in defending him in a prosecution for dacoity (*j*). So also is a loan to a minor to save his property from sale in execution of a decree (*k*). Money advanced to a Hindu minor to meet his marriage expenses is supplied for "necessaries," and may be recovered out of his property (*l*), but without interest (*m*).

As to the definition of necessaries in general, see notes to section 11, under the head "Necessaries."

Reimbursement of person paying money due by another, in payment of which he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

(*h*) (1903) 30 Cal. 593; L. R. 30 I.A. 114.

(*i*) *Watkins v. Dhunnoo Baboo* (1881) 7 Cal. 140; *Phakram v. Ayub Khan* (1926) 49 All. 52, 98 I.C. 657, ('27) A.A. 55.

(*j*) *Sham Charan Mal v. Chowdhry Debya Singh* (1894) 21 Cal. 872.

(*k*) *Kidar Nath v. Ajudhia* (1883) Punj. Rec. no. 185.

(*l*) *Pathak Kali Charan v. Ram Deni Ram* (1917) 2 Pat. L. J. 627; *op. Regd. Sessore Loan Co., Ltd. v. Gopal Hari Ghose Chondhuri* (1928) 30 C.W.N. 366, 94 I.C. 159, ('26) A.G. 657; *Meenkashi v. Ranga Ayyangar* ('32) A.M. 696, 139 I.C. 383; *Shrinivasrao v. Baba Ram* ('33) A.N. 285, 145 I.C. 350.

(*m*) *Ramchandra v. Hari* ('36) A.N. 12.

Illustration.

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B holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B* to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid (*n*).

[As to the date from which time runs for the purpose of limitation in cases within this section, see *Muthaswami Kavundan v. Ponnayya Kavundan* (1928) 51 Mad. 815.]

English law.—This section lays down a wider rule than appears to be supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money (*o*). This is not enough, in the Common Law, to found a claim to reimbursement by the person interested if he makes the payment himself. Authoritative statements in English books are much more guarded, for example: "If *A* is compellable to pay *B* damages which *C* is also compellable to pay *B*, then *A*, having been compelled to pay *B*, can maintain an action against *C* for money so paid, for the circumstances raise an implied request by *C* to *A* to make such payment in his case. In other words, *A* can call upon *C* to indemnify him" (*p*).

But the English authorities do not cover a case where the plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay, though the payment was to his advantage. The assignee of a term of years mortgaged the premises by sub-lease. The mortgagees took possession, but did not pay the rent due under the principal lease. The original lessees, who of course remained liable to the lessors, had to pay the rent, and sued the mortgagees to recover indemnity. It was held that the action did not lie (*q*), for there was no obligation common to the plaintiff and the defendant. It was to the mortgagees' interest that the rent should be paid, but no one could call on them to pay it.

(*n*) *Faiyazunissa v. Bajrang Bahadur Singh* (1927) 1 Luck. 275, 104 I.C. 358, (27) A.O. 609.

(*o*) The view propounded in the text was adopted by Stanley, C.J., in *Tulsa Kunwar v. Jageshar Prasad* (1906) 28 All. 563, by the Madras High Court in *Subramania Iyer v. Rungappa* (1909) 33 Mad. 232 and by the Calcutta

High Court in *Pankhabati v. Nani Lal* (1914) 18 C. W. N. 778, 781; *Siti Fakir v. Chand Beura* (1928) 32 C.W.N. 1087, 108 I.C. 46, (28) A.C. 389.

(*p*) *Bonner v. Tottenham, etc., Building Society* [1898] 1 Q. B. 161, 167, per A. L. Smith, L.J.

(*q*) *Bonner's Case* [1898] 1 Q. B. 161, 167.

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"Person . . . interested in the payment of money."—This section only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover, under this section (r). Thus where *A* purchases property from *B*, and the sale is fictitious, *A* cannot recover from *B* money paid by him to save the property from being sold in execution of a decree against *B* (s). It is otherwise, however, if the sale is *bona fide* (t). Where *A*'s goods are wrongfully attached in order to realize arrears of Government revenue due by *B*, and *A* pays the amount to save the goods from sale, he is entitled to recover the amount from *B* (u).

It is enough for a person claiming under the provisions of this section to show that he had an interest in paying the moneys *at the time of payment*. Thus moneys paid by a person while in possession of an estate under a decree of a court to prevent the sale of the estate for arrears of Government revenue may be recovered by him under this section, even though the decree may be subsequently reversed and he may be deprived of possession (v).

In *Ram Tuhul Singh v. Biseswar Lal* (w) the Judicial Committee, in dealing with the rights of parties making payments, observed: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a *voluntary* payment by *A* of *B*'s debt."

"Bound by law."—The liability for which payment may be made under this section need not be statutory (x). Contractual liability, on the other hand, is not a necessary element (y). An action to recover money paid is not maintainable under this section unless the person from whom it is sought to be recovered was bound by law to pay it. And where the income-tax authorities assessed the widow of a deceased Hindu in respect of

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| <p>(r) See <i>Desai Himatsingji v. Bhavabhai</i> (1880) 4 Bom. 643, 652. See also <i>Secy. of State v. Rangasawami & Co.</i> (1927) 106 I. C. 657, ('28) A.M. 198.</p> <p>(s) <i>Janki Prasad Singh v. Baldeo Prasad</i> (1908) 30 All. 167.</p> <p>(t) <i>Subramania Iyer v. Rungappa</i> (1909) 33 Mad. 232.</p> <p>(u) <i>Tulsa Kunwar v. Jageshwar Prasad</i> (1906) 28 All. 563; <i>Abid Husain v. Gnaga Sahai</i> (1928) 26 All. L. J. 435, 113 I.C. 441, ('28) A.A. 353.</p> | <p>(v) <i>Dakhina Mohan Roy v. Sarodu Mohan Roy</i> (1893) 21 Cal. 142, 20 L. R. I. A. 160; <i>Nagendra Nath Roy v. Jugal Kishore Roy</i> (1925) 29 C. W. N. 1052, 90 I. C. 281, ('25) A. C. 1097.</p> <p>(w) (1875) 15 B. L. R. 208; L. R. 2 I. A. 131; <i>Panchkore v. Hari Das</i> (1916) 21 C. W. N. 394, 399.</p> <p>(x) <i>Mothooranath v. Kristokumar</i> (1878) 4 Cal. 369, 373.</p> <p>(y) <i>Rasappa Pillai v. Doraisami Reddiar</i> (1925) 49 Mad. L. J. 88, 90 I. C. 545, ('25) A. M. 1041.</p> |
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outstandings forming part of the estate of the deceased, notwithstanding remonstrances on her part that the outstandings had not come to her, but had been bequeathed under the will of the deceased to the defendants, and the widow paid the tax, it was held that she could not recover the amount from the defendants under this section, for the defendants, not being the parties assessed, were not "bound by law" to pay the tax (z).

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Obligation of person enjoying benefit of non-gratuitous act.

Illustrations.

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

Non-gratuitous act done for another.—This section goes far beyond English law (a). By the Common Law, if goods, work, or anything valuable be offered in the way of business and not as a gift, the acceptance of them is evidence of an agreement—a real, not a fictitious, agreement, though it need not be expressed in words—to pay what the consideration so given and taken is reasonably worth. A man is not bound to pay for that which he has not the option of refusing. Under this section it would seem that whoever finds and restores lost property, apart from any question of a reward having been offered, is entitled to compensation for his trouble if he did not intend to act gratuitously. This is certainly not the Common Law rule.

"The terms of [this section] are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract" (b). The section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered (c).

The section does not apply where an act is done by one person at the express request of another. Thus if a client engages a pleader to act for him

(z) *Raghavan v. Alamelu Ammal* (1907) 31 Mad. 35.

(a) This was recognised in *Jarao Kumari v. Basanta Kumar Roy* (1905) 32 Cal. 374, 377.

(b) *Suchand v. Balaram* (1910) 38 Cal. 1.

(c) *Nathu v. Balwantrao* (1903) 27 Bom. 390, 393; *Suraj Bahu v. Hashmi Begam* (1918) 40 All. 555.

S. 70 in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this section, but because the request implies a promise to pay such remuneration (*d*).

Contribution.—By this section three conditions are required to establish a right of action at the suit of a person who does anything for another : (1) the thing must be done lawfully ; (2) it must be done by a person not intending to act gratuitously ; and (3) the person for whom the act is done must enjoy the benefit of it (*e*). Thus in *Damodara Mudaliar v. Secretary of State for India* (*f*) eleven villages were irrigated by a certain tank, some of which were zamindari villages, and others were held under Government. The Government effected certain repairs necessary for the preservation of the tank, and it was found that they did not intend to do so gratuitously for the zamindars, and that the latter had enjoyed the benefit thereof. The zamindars were under the circumstances held liable to contribute to the expenses of the repairs. Upon the same principle, where a mortgagee threatened to sell the land mortgaged to him and one of the co-sharers paid up the mortgage debt to prevent the property from being sold, it was held that he was entitled to contribution from the other co-sharers (*g*). It is, however, different, if the person paying the amount has no interest in the property at all (*h*). It has been held by the Judicial Committee that a co-heir is not bound to contribute towards the expenses of litigation incurred by other co-heirs in respect of the common property, though the litigation may have been carried on *bona fide*, and though he may have benefitted by the litigation (*i*). But when one of two joint tenants pays the whole rent to the landlord, he is entitled to contribution from his co-tenant (*j*).

“Lawfully.”—By the use of the word “lawfully” in this section the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person the person doing the act was entitled to look for compensation to the person for whom it was done (*k*). The word “lawfully” in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment

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| <p>(<i>d</i>) <i>Sibkisor Ghose v. Manik Chandra</i> (1915) 21 Cal. L. J. 618.</p> <p>(<i>e</i>) <i>Damodara Mudaliar v. Secretary of State for India</i> (1894) 18 Mad. 88; <i>Ranjani Kant v. Rama Nath</i> (1914) 19 C. W. N. 458, 460; <i>Lakshmanan v. Arunachalam</i> ('32) A.M. 151, 135 I. C. 590.</p> <p>(<i>f</i>) (1894) 18 Mad. 88; <i>Kashi Nath v. Nawab Alam</i> ('34) A.P. 346, 150 I. C. 1131.</p> <p>(<i>g</i>) <i>Khairat Husain v. Haidri Begam</i> (1888) All. W.N. 10.</p> <p>(<i>h</i>) <i>Yagombol v. Naina Pillai</i> (1909)</p> | <p>33 Mad. 15.</p> <p>(<i>i</i>) <i>Abdul Wahid Khan v. Shaluka Bibi</i> (1894) 21 Cal. 496; L. R. 21 I.A. 26. See also <i>Jyani Begam v. Umraso Begam</i> (1908) 32 Bom. 612; <i>Gulam Ali v. Inayyat Ali</i> ('33) A.L. 95 141 I. C. 68.</p> <p>(<i>j</i>) <i>Nirdosh v. Jakaria</i> (1914) 20 Cal. L. J. 492.</p> <p>(<i>k</i>) <i>Chedi Lal v. Bhagwan Das</i> (1888) 11 All. 234, 243; see <i>Gordhanlal v. Darbar Shri Surajmalji</i> (1902) 26 Bom. 504. 518.</p> |
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had any lawful interest in making it, if not, the payment cannot be said to have been made lawfully (l). A payment made by a person fraudulently and dishonestly with the intention of manufacturing evidence of title to land which belonged to the defendant, and to which he knew he had no claim, is not lawful within the meaning of this section (m).

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Responsibility of finder of goods. 71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

Liability of finder.—As to who is a bailee and what are his responsibilities, see Ch. IX below.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion. 72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations.

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Payment under mistake of fact or mistake of law.—The rule of the Common Law is that "money paid under mistake or ignorance of fact may be recovered back where the supposed state of fact is such as to create a liability to pay the money, which in reality is not due" but "a payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore as regards the motive of the party is voluntary, cannot be recovered back" (n). The mistake must be of a fact fundamental to the transaction and on the assumption of which the contract was concluded, as when payment is made by an insurance company on the assumption of a loss by perils insured against though there was in fact no such loss (o). The mistake must be of some fact causing a liability to

(l) *Panchkore v. Hari Das* (1916) 21 C. W. N. 394, 399. A reversioner expectant on the death of a Hindu widow has no such interest : *Gopeshwar Banerjee v. Brojo Sundari Devi* (1922) 49 Cal. 470.
(m) *Desai Himatsinji v. Bhavabhai*

(1880) 4 Bom. 643, 653. See also *Jinnat Ali v. Fateh Ali* (1911) 15 C.W.N. 332, 334, 335.

(n) *Leake*, 66, 67.

(o) *Norwich Union Fire Insurance v. Price* ('34) A.P.C. 171, 151 I.C. 548.

- S. 72** pay (*p*). It is material only so far as it leads to the payment being made without consideration, and a wrong reason not affecting the substance of the transaction itself is not a failure of consideration (*q*). A debtor may recover from a creditor the amount of an overpayment made to him if it was made by mistake (*r*).

Mistake of law is not expressly excluded by the words of this section; but sec. 21 shows that it is not included. Thus payment made by *A* to *B* upon a misconstruction of the terms of a lease (*s*) or misunderstanding of an official scale of charges (*t*) cannot be recovered back.

Coercion.—The Judicial Committee had laid down that the word “coercion” in this section is used in its general and ordinary sense and its meaning is not controlled by the definition of “coercion” in sec. 15. Accordingly where *A* who had obtained a decree against *B*, obtained an attachment against *C*’s property, and took possession of it to obtain satisfaction for the amount of the decree, and *C* on being ousted from his property paid the sum claimed under protest, *C* was held entitled to recover the sum as money paid under “coercion” within the meaning of this section (*u*). In this case *C* sued for a declaration that the attachment was invalid and for a refund of the money paid. But if a defendant has had an opportunity of defending, of which he has not availed himself, he is not allowed to re-open the question in an action to get the money back. This is the foundation of the rule that money paid under pressure of legal process cannot be recovered (*v*).

Money paid under O. 21, r. 89 of the Code of Civil Procedure, to set aside a sale is paid voluntarily and cannot be recovered as paid under coercion (*w*).

Where a person who is charged with a non-compoundable offence is induced to pay money to the complainant to stifle the prosecution, he may recover the money so paid under this section (*x*); but not if no pressure or compulsion was exercised upon the accused (*y*). As the right under this section is a statutory right it is not subject to equitable considerations (*z*).

(*p*) *Adaikappa v. Thomas Cook & Son* (1933) 64 M. L. J. 184, 142 I. C. 680, ('33) A.P.C. 78.

(*q*) *Balfour v. Sea Fire Assurance* (1857) 3 C. B. N. S. 300.

(*r*) *Badr-un-nisa v. Muhammad Jan* (1880) 2 All. 671, 674.

(*s*) *Khozan Sing v. The Secretary of State* (1878) Punj. Rec. no 33.

(*t*) *Appavoo Ohelliar v. S. I. R. Co.* (1929) 56 Mad. L. J. 269, 114 I.C. 358, ('29) A. M. 177.

(*u*) *Seth Kanhaya Lal v. National Bank of India* (1913) 40 I.A. 56; 40 Cal. 598; followed, *Ah Choon v. T. S. Firm* (1927) 5 Rang. 653, 106 I.C. 468, ('28) A. R. 55; *Satyam v.*

Perraju ('31) A. M. 753, 135 I.C. 24.

(*v*) *Marriot v. Hampton* (1797) 2 Smith L.C. 421; *Secretary of State v. Tatyasaheb* (1932) 56 Bom. 501, 34 Bom. L. R. 791, 140 I. C. 171, ('32) A.B. 386.

(*w*) *Shankarrao v. Vadilal* (1933) 57 Bom. 601, 35 Bom. L. R. 462, 148 I. C. 74, ('33) A.B. 239.

(*x*) *Muthuveerappa v. Ramaswami* (1917) 40 Mad. 285.

(*y*) *Amjadnessa Bibi v. Rahim Buksh* (1915) 42 Cal. 286.

(*z*) *Kanhaya Lal v. National Bank of India, Ltd.* (1923) 50 I.A. 162, 4 Lah. 284.

CHAPTER VI.

Of the Consequences of Breach of Contract.

73. When a contract has been broken (a), the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. S. 73

Compensation for loss or damage caused by breach of contract.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract (b).

Compensation for failure to discharge obligation resembling those created by contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price, to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[Note.—Market rate.—Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price and the market price *at the date of the breach*. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises (c).]

(a) This section is declaratory of the Common Law as to damages. *Jamal v. Moola Dawood Sons & Co.* [1916] 43 I. A. 6, 11; 43 Cal. 493, 503.

(b) *See Anrudh Kumar v. Luchhmi Chand* (1928) 50 All. 818, (28) A. A. 500.

(c) *Jamal v. Moola Dawood Sons & Co.* [1916] 43 I.A. 6; 43 Cal. 493.

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Generally it is quite settled that on a contract to supply goods (d) of a particular sort, which at the time of the breach can be obtained in the market, the measure of damages is the difference between the contract price and the market price at the time of the breach. But the subject-matter of the contract may not be marketable. In that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute: *Hinde v. Liddell* (1875) L.R. 10 Q. B. 265, 269.

Again, if the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually paid: *Ogle v. Earl Vane* Ex. Ch. (1868) L. R. 3 Q. B. 272. Accordingly the decisive date for fixing the damages is the last date to which the contract was extended: *Kedar Nath-Behari Lal v. Shimbhu Nath-Nandu Mal* (1926) 8 Lah. 198, 99 I. C. 812, ('27) A. L. 176.

The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer. The buyer is entitled, as indicated by illustration (a) to the section, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer *might* have obtained goods of like quality at the time when they ought to have been delivered (e).

Market rate: limits of rule.—The market rate, however, is only a presumptive test: "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed," and the rule as to market price "is intended to secure only an indemnity" to the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser." If he does not get his goods he "should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market." There is an important exception "if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value." In such a case he must allow for the profit he actually makes and can recover only his actual loss; otherwise he would be placed in a better position than if the contract had been performed.

(d) Including shares in a company, see *Williams Bros. v. Ed. T. Agius* [1914] A. C. 510.

(e) *Hajee Ismail & Sons v. Wilson &*

Co. (1918) 41 Mad. 709; *Errol Mackey v. Kameshwar* (1932) 59 I. A. 398, 11 Pat. 600, 34 Bom. L. R. 1596, 138 I. C. 658, ('32) A.P.C. 196.

So the law is explained by the Judicial Committee in *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301, 307, 308. S. 73

The defendant contracted to deliver to the plaintiff 1,000 tons of coal by instalments from February to June. The coal was not delivered and there was in those months no ready market for coal of the contract quality. In the absence of other material, the Court, in order to ascertain the measure of damages, admitted evidence of rates fixed in sub-contracts made by the plaintiff for the sale of the coal: *Jagmohandas v. Nusserwanji* (1902) 26 Bom. 744.

(b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

[Note.—*A* contracts with *B* to sell and deliver goods which on the day appointed for delivery are worth Rs. 80 per ton. They are delivered later on a day when they are worth only Rs. 50 per ton, but meanwhile *A* has sold them for Rs. 70 per ton. *A* is entitled to damages only for his actual loss of Rs. 10 per ton: *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301 (see above).]

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

[Note.—Where no time fixed for delivery.—If in the case put above *A* gives notice to *B* that he will not take delivery after a certain date, and *B* does not deliver by that date, the measure of damages would be the difference between the contract price and the market price on that date: *Gauri Datt v. Nanik Ram* (1916) 14 All. L. J. 597.]

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby

- S. 73** the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

[**Note.—Late delivery.**—There is no general rule that the measure of damages in the case of late delivery when the carriage is by sea is governed by different principles to those that apply when the carriage is by land: “wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases”: *Dunn v. Bucknall Bros.* [1902] 2 K. B. 614, 622 C. A.]

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

[**Note.—Delivery by instalments—Anticipatory breach.**—If the iron was to be delivered by instalments at certain dates, *e.g.*, at the end of the three months of September, October, and November, the measure of damages is the sum of the differences between the contract and the market price of the several instalments on the respective final days for performance: *Brown v. Muller* (1872) L. R. 7 Ex. 319; and the same rule is applied where the seller, before the expiration of the whole time for performance, has refused to complete the contract, and the buyer has treated the refusal as an immediate breach unless the seller can show that the buyer could have obtained a new contract on better terms: *Roper v. Johnson* (1873) L. R. 8 C.P. 167; *Krishna Jute Mills Co. v. Innes* (1911) 21 Mad. L. J. 182.]

(i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

[Note.—Notice of special circumstances.—The facts in *Hadley v. Baxendale*, 9 Ex. 341, were somewhat similar to those in illustration (i), except that the defendants did not know that the plaintiff's mill was stopped for want of part of the machinery which they were to supply. They were held not liable for loss of profit. It may be collected from the judgment that with such knowledge they would have been liable. As to the general rule there laid down see the commentary below. The loss of profits on a contract of which the defendant had not notice is clearly too remote. But where the defendant failed to supply an essential part of a machine which the plaintiff, to his knowledge, was under contract to supply to a third person, and the plaintiff, by the defendant's default, lost the benefit of that contract, the defendant was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine: *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. Div. 670.]

(j) *A*, having contracted with *B*, to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequences rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

[Note.—Notice of contract of resale.—If *C* only knew generally that *A* wanted the iron for re-sale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach: *Thol v. Hendersom* (1881) 8 Q. B. D. 457. If there is no market price the measure of damages is the difference between the re-sale price and the contract price: *Zippal v. Kapur & Co.* ('32) A.S. 9, 139 I.C. 114.]

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of

S. 73 that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

[The following additional illustration is taken substantially from the headnote to *Kasler & Cohen v. Slavonski* [1928] 1 K. B. 78 :—

B, a wholesale furrier, bought some dyed rabbit skins from *A* for the purpose, as *A* knew, of making them into fur collars. *B*, having made the fur collars, resold to *C*, *C* resold to *D*, and *D* to *E*, a draper.

E then sold a coat, with one of these fur collars attached, to *F*, a customer, for her own wear. *F* developed "fur dermatitis," owing to antimony in the fur. *F* sued *E* for damages for breach of warranty on the sale of the coat. *E* gave notice of the action to *D*, *D* to *C*, *C* to *B*, and *B* to *A*. *F* recovered judgment for damages and costs. *E* claimed this sum, together with his own costs, from *D*, who paid the amount and recovered it from *C*, together with a further sum for his costs. *C* claimed from *B*, and *B* paid him and sued *A* for £699 damages for breach of the original warranty on sale of the skins.

The Court, having found as a fact that *E* had acted reasonably in defending the original action by *F*, held that *B* was entitled to recover from *A* (1) the damages recovered in the original action by *F*; (2) the costs of both sides in that action; and (3) a sum in respect of costs incurred by themselves and *C* and *D* respectively in connection with the claims against them.]

[Note.—Notice of special circumstances.—In *Jaques v. Millar* (1877) 6 Ch. D. 153 it was held that where an intending lessor knew that the lessee wanted the premises for a certain trade, and refused to deliver possession for several weeks after the lessee was entitled to it, the lessee could recover for the estimated value to him of the possession during that time.]

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty,

and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

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[Note.—Warranty.—*A* sells a cow to *B*, whom he knows to be a farmer, and likely to put the cow in a herd, with a warranty that she is free from foot and mouth disease. The cow in fact has the disease and communicates it to other cows with which she is placed, and several of them die. *B* can recover from *A* the whole loss, and not only the value of the cow sold, and it is immaterial whether *A* gave the warranty in good faith or not: *Smith v. Green* (1875) 1 C. P. D. 92.]

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B* in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

[Note.—Delay in payment of money.—“The law does not regard collateral or consequential damages arising from delay in the receipt of money”: Per Cur., *Graham v. Campbell* (1878) 7 Ch. Div. at p. 494.]

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

[Note.—The illustration assumes that there was a market price on the first of January. If there was no market price on that day the difference between the resale price and the contract price would be the measure of damages. See notes under illustration (j) and also the note “Market price” and the case of 26 Bom. 744 there cited. In an English case (f) on a wilful default by a vendor of real estate to give possession a contract to resell was accepted as evidence of an advance of market value.]

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

(q) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making

(f) *Engell v. Fitch* (1869) L.R. 4 Q. B. 659 Ex. Ch.

- S. 73** caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

[**Note.**—Loss of profits on breach of contract.—The market price is here the price as diminished by the want of demand consequent on the season being past.

A tailor, expecting to make large profits on the occasion of a festival that is to be held at a certain place, delivers a sewing machine and a cloth bundle to a railway company to be conveyed to that place, and through the fault of the company's servants they are not delivered until after the conclusion of the festival. The company had no notice of the special purpose for which the goods were required. The tailor is not entitled to damages for the loss of profits nor for his expenses incidental to the journey to that place and back, as such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach: *Madras Railway Co. v. Govinda Rau* (1898) 21 Mad. 172 (g).]

(r) *A*, a shipowner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late (h).

[**Note.**—No notice of special circumstances.—In this illustration it seems to be assumed that *A* does not know *B*'s particular reason for wanting to be at Sydney by a certain date. *A* contracts to sell by description to *B* sulphuric acid commercially free from arsenic. *A* does not know what *B* wants the acid for. *B* receives sulphuric acid from *A* under the contract, and uses it in producing a kind of sugar used by brewers. The acid is, in fact, not free from arsenic, the sugar manufactured with it is deleterious and useless, and *B* incurs liability to his customers, and the

(g) See also *Fazal Ilahi v. East Indian Rly. Co.* (1921) 43 All. 623.

(h) This illustration does not affect the rule as to measure of damages

where the contract is for the sale of goods: *Kandappa Mudaliar v. Muthuswami Ayyar* (1926) 50 Mad. 94, 99 I.C. 609, ('27) A.M. 99.

goodwill of his business is diminished in value and other goods of *B*'s are spoilt by being mixed with this acid. *B* is entitled to recover from *A* only the price of the acid and the value of the goods spoilt; *Bostock & Co. v. Nicholson & Sons* [1904] 1 K. B. 725.]

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Remedy provided by this section not the only remedy for breach of contract.—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may, at his option, either sue for the price of the goods or for damages for non-acceptance. The present section prescribes the method of assessing the damages, and it does not take away the right of a seller to maintain an action for the price where the property in the goods has passed to the buyer (i).

Rule in *Hadley v. Baxendale*.—The illustrations to this section were obviously considered of special importance. We have thought that several of the English and recent Indian decisions would be most usefully dealt with by stating them in the form of additional illustrations and inserting them, distinguished by inclusion within square brackets and by the reference to the report of each case, in the places which seemed most appropriate.

The intention of the framers of the Act was plainly to affirm the rule of the Common Law as laid down by the Court of Exchequer in the leading case of *Hadley v. Baxendale*, decided more than seventy-five years ago. That rule, expressly and carefully framed to be a guide to judges in directing juries, was as follows :

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For,

(i) *P. R. & Co. v. Bhagwandas* (1909) 34 Bom. 192; *Finlay Muir and Co.*

v. Radhakissen (1909) 36 Cal. 736.

S. 73 had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." (j)

So far as practicable, "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly." It is even his duty to take all reasonable steps to mitigate the loss consequent on the breach; and then the effect in actual diminution of the loss he had suffered may be taken into account, and this apart from the question whether it was his duty to act (k). "The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances," and one test is "what a prudent person uninsured," i. e., not having a claim for compensation or indemnity on any one, "would do under the same circumstances" (l). It is not a reasonable thing, for example to hire a special train to save an hour or so of time when there is no particular reason for being at one's destination at a certain hour; and expense so incurred cannot be recovered as damages (l). In English law if a buyer disappointed of his goods can buy in the market at a sum equal to or less than the contract price, he has suffered no loss and can recover only nominal damages (m).

Explanation to sec. 73: "means which existed," etc.—This explanation has caused considerable difficulty in practice; the words "means which existed of remedying the inconvenience" have seemed obscure.

In this connection may be noted the observations of the Judicial Committee in *Jamal v. Moolla Dawood Sons & Co.* (n). "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (o) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract."

(j) *Hadley v. Baxendale* (1854) 9 Ex. 341, 354.

(k) *British Westinghouse, &c., Co. v. Underground Electric, &c., Co.* [1912] A. C. 673, see per Lord Haldane at p. 689.

(l) *Le Blanche v. L. & N. W. R. Co.* (1876) 1 C. P. Div. 286, 309, 313; approved by the Judicial Com-

mittee in *Erie County Natural Gas, &c., Co. v. Carroll* [1911] A. C. 105.

(m) *Erie County, &c., Co.'s Case*, last note.

(n) (1916) L. R. 43 I. A. 6, 10; 43 Cal. 493, 502.

(o) (1830) 7 Bing. 169.

In the case of an anticipatory breach the duty to mitigate damages does not require the party who suffers from the breach to go into the market in search of another contract. *Z*, a millowner, agreed to put his mill at the disposal of *A*, a cotton merchant, for six months and to gin cotton which *A* would buy and bring to the mill. *Z* repudiated the contract soon after it was made. The Privy Council held that *A* was not obliged to prove that he had purchased cotton and tendered it to other mills so that damages might be assessed at a difference of rates. Their Lordships said that as it was an anticipatory breach *A* was entitled to damages assessed on an estimate of profits at the date of breach (*p*).

Contracts relating to immovable property.—The rule as to damages as enunciated in *Hadley v. Baxendale* (*q*) does not apply in English law to contracts for the purchase of immovable property. It was finally settled by the decision of the House of Lords in *Bain v. Fothergill* (*r*) that a purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses; and that even if the vendor knew that he had no title, nor any means of acquiring it, the purchaser may have a further remedy by an action for deceit, but not on the contract. The reason for this exceptional rule is that the purchaser of real estate in England must expect some degree of uncertainty as to whether a good title can be effectively made by the vendor, whereas the vendor of a chattel must know, or at all events is taken to know, what his right to the chattel is.

The rule in *Bain v. Fothergill* was at one time assumed in the High Court of Bombay to be the law of British India (*s*). But sec. 73 is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property, and in fact the rule was not settled beyond question in England when the Act was passed. "The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities" (*t*). Therefore, when a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him "naturally arose in the usual course of things from such breach"; and in an ordinary case it would be difficult to hold otherwise.

The view propounded above was approved by the High Court of Bombay in *Ranchhod v. Manmohandas* (*u*). In that case the Court expressed the opinion that the rule in *Bain v. Fothergill* (*v*) was not law in this country.

- (*p*) *Ramgopal v. Dhanji Jadhavji Bhatia*
(1928) 55 Cal. 1048, 55 I. A. 299
(P.C.) 30 Bom. L.R. 1339, 111 I.C.
480, ('28) A.P.C. 200.
(*q*) (1854) 9 Ex. 341, 96 R. R. 742.
(*r*) (1874) L. R. 7 H. L. 158.

- (*s*) *Pitamber v. Cassibai* (1886) 11 Bom.
272.
(*t*) Per Farran, G. J., in *Nagardas v.*
Ahmedkhan (1895) 21 Bom. 175, 185.
(*u*) (1907) 32 Bom. 165.
(*v*) (1874) L. R. 7 H. L. 158.

S. 73 "As section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of an immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages" (w). A similar view has been expressed by the High Courts of Calcutta (x), Lahore (y) and Madras (z). Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money paid for it (a).

Interest by way of damages.—Act XXXII of 1839 provides for the payment of interest by way of damages in certain cases. Under that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing from the time when the amount becomes payable where a time is fixed for payment, or, where no time is fixed, from that date on which demand of payment is made in writing giving notice to the debtor that interest will be claimed. The question arose in a Madras case (b) whether interest could be recovered by way of damages under the present section (illustration (n)) where it was not recoverable under the Interest Act, and it was held that it could not be so recovered.

The Madras decision has been followed by the Chief Court of the Punjab (c) but dissented from by the High Court of Calcutta. According to the Calcutta Court, interest may be awarded as damages for wrongful detention of money under the present section, though there may be no agreement to pay interest and though the case may not be covered by the Interest Act (d).

The rule of English Common Law, and therefore presumably of British India apart from the Interest Act, is ("that interest is not due on money secured" even "by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments" (e).

(w) Per Macleod, J., 32 Bom. 165, 171. See *Vallabhdas v. Nagardas* (1921) 23 Bom. L. R. 1213. In practice the assessment of damages for a defective title may have to be rough, see *Harilal Dalsukhram v. Mulchand* (1928) 52 Bom. 883, 30 Bom. L. R. 1149, 113 I. C. 27, ('28) A. B. 427.

(x) *Nabinchandra v. Krishna* (1911) 38 Cal. 458, at p. 465.

(y) *Jai Kissen Das v. Aiya Priti Nidhi Sabha* (1920) 1 Lah. 380.

(z) *Adikesavan Naidu v. Gurunatha* (1918) 40 Mad. 338.

(a) *Nagardas v. Ahmedkhan* (1895) 21

Bom. 175.

(b) *Kamalammal v. Peeru Meera Levvai Rowthen* (1897) 20 Mad. 481.

(c) *Arjan Das v. Hakim Rai* (1913) Punj. Rec. No. 39, 154.

(d) *Khetra Mohan v. Nishi Kumar* (1917) 22 C.W.N. 488; *Anrudh Kumar v. Lakhmi Chand* (1928) 50 All. 818, ('28) A. A. 500.

(e) *Page v. Newman* (1829) 9 B. & C. 378, 381; and see the English authorities reviewed by Lord Herschell, *L. C. & D. R. Co. v. S. F. R. Co.* [1893] A. G. 429, 437, *sqq.*

There does not seem to be any sufficient ground for reading into illustration (n) to the present section an intention to abolish this rule and supersede the Act of 1839. Indeed, the illustration does not say that the defendant is necessarily liable to pay interest, but only assumes that he may be so under the Act of 1839 or otherwise, and says that he is not in any event liable for more.

But in the case of breach of a contract of sale the Court may now award interest to a seller suing for the price and to a buyer suing for refund : Indian Sale of Goods Act III of 1930, sec. 61, which see below (f).

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognisance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a) *A* contracts with *B* to pay *B* Rs. 1,000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(f) As to the former Indian law, see *Kandappa Mudaliar v. Muthu-*

swami Ayyar (1927) 50 Mad. 94, 99 I.C. 609, ('27) A.M. 99.

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(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalments, the whole shall become due. The stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty (g).

Penalty and liquidated damages.—This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. By the Common Law parties may name a penal sum as due and payable on a breach of contract, that sum being, according to the true intention of the parties, only a maximum of damages. In that case the real damages, and no more, are recoverable. On the other hand, they may by consent assess a fixed measure of damages, liquidated damages as they are called, to avoid the difficulty that must often be found in setting a pecuniary value on obligations not referable, on the face of them, to any commercial standard. So far this looks very well. The trouble is that even now the Courts have not arrived at clear or certain rules for deciding to which of these two classes a given stipulation for a penal or seemingly penal sum belongs. The only thing that is quite certain is that the use of the words "penalty" or

(g) See as to a similar clause in a
"chitfund" bond: *Ramalinga*
Adaviar v. Meenakshisundaram

(1924) 47 Mad. L. J. 833, 85 I. C.
261, (25) A.M.177.

"liquidated damages" is not decisive: and that even the addition of negative words purporting to exclude the other alternative, for example "as liquidated damages and not as a penalty" (h), will not make it so. The manifest purpose of the present section is to get rid of all these questions by carrying out the tendency of the English authorities to its full consequences (i). An agreement may allow a debtor to discharge his debt by payment of a lesser sum by instalments with a stipulation that in default of any one instalment the larger amount of the original debt shall be payable. Such a stipulation is merely the withdrawal of a concession. It is not in the nature of a penalty and the Court has no power to grant relief against it (j).

Stipulations for interest.—By far the largest number of cases decided under this section related to stipulations providing for interest. Those stipulations may be divided into the following five classes:—

I. Stipulations for payment of interest at a higher rate on default on the part of the debtor to pay the principal or part thereof or interest on the due date, and these may again be subdivided into

(a) Stipulations for payment of enhanced interest from the *date of the bond*, and

(b) Those for payment of such interest from the *date of default*;

II. Stipulations for payment on default of compound interest, which may be divided into

(a) Stipulations for payment of compound interest at the same rate as simple interest, and

(b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased rate of interest and compound interest at that rate;

III. Stipulations for payment of interest at a specified rate if the principal or a part thereof is not paid on the due date;

IV. Stipulation for payment of interest at a lower rate, if interest paid on due dates;

V. Stipulations for payment of interest from the date of the bond, but at an exorbitant rate.

The stipulations comprised in the above classes are considered below:—

I. **Stipulations for enhanced rate of interest.**—Such a stipulation occurring in a contract may be of a twofold character: (1) it may either provide for payment of interest at an increased rate from the *date of the contract* on failure of the debtor to pay on the due date the interest or principal or an instalment of principal, or (2) it may provide for payment at a higher rate from the *date of default* only. Thus if A borrows Rs. 1,000 from B

(h) *Kemble v. Farren* (1829) 6 Bing. 141.

(i) That this is now fully settled, see *Panna Singh v. Arjan Singh* (1929) 33 C.W.N. 949, 31 Bom. L.R. 909,

117 L.C. 485, ('29) A.P.C. 179.

(j) *Burjorji v. Madhavlal* (1934) 58 Bom. 610, 36 Bom. L.R. 793, 152 I.C. 575, ('34) A.B. 370.

S. 74 on 1st June, 1902, *A* may give a bond to *B* for repayment of the loan on 1st June, 1903, with interest at 12 per cent. per annum, with a stipulation either that in case of default interest shall be payable at the rate of 25 per cent. from the *date of the bond*, namely, 1st June, 1902, or from the *date of default*, namely, 1st June, 1903. In the former case it has been held that the stipulation *always* (*k*) amounts to a penalty, and the provisions of sec. 74 apply, so that the Court may relieve the debtor, and award only such compensation to the creditor as it considers reasonable (*l*). In the latter case, where the increased rate of interest is stipulated to have operation only from the date of default, the provision has not generally been regarded as a penalty (*m*). But such a stipulation *may* in some cases be penal. Whether it is a penalty or not is a question of construction. "It is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty" (*n*). It will be held to be penal if the enhanced rate is unconscionable or if it is such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties (*o*).

The law as to such stipulations may be stated as follows:—

(a) A stipulation for increased interest from the date of the bond is *always* in the nature of a penalty, and relief will be granted against it.

(b) A stipulation for increased interest from the date of default *may* be a stipulation by way of penalty, and whenever it is so relief will be granted under this section. Whether such a stipulation is penal is a question of construction dependent upon the considerations set out above.

II. Stipulations for compound interest (*p*).—A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a penalty within

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| <p>(<i>k</i>) The leading case on the subject is <i>Mackintosh v. Crow</i> (1883) 9 Cal. 689. The result of the cases will be found summarised in <i>Umarkhan v. Salekhan</i> (1892) 17 Bom. 106, 113, 114, and in <i>Abdul Gani v. Nandlal</i> (1902) 30 Cal. 15, 17.</p> <p>(<i>l</i>) <i>Rameshwar Prosad Singh v. Rai Sham Kishen</i> (1901) 29 Cal. 43, 50; <i>Trimback v. Bhagchand</i> (1902) 27 Bom. 21. See also <i>Sunder Koer v. Rai Sham Krishen</i> (1907) 34 Cal. 150, 157, L. R. 34 I.A. 9.</p> <p>(<i>m</i>) <i>Abdul Gani v. Nandlal</i> (1902) 30 Cal. 15; <i>Umarkhan v. Salekhan</i> (1892) 17 Bom. 106; <i>Periasami Thallavar v. Subramanian Asari</i> (1904) 14 Mad. L. J. 136; <i>Chuni</i></p> | <p><i>Lal v. Munna Lal</i> (1930) 11 Lah. 635, 131 I.C. 368, ('31) A. L. 120; <i>Rama Krishnayya v. Venkata</i> ('34) A. M. 31, 148 I.C. 467.</p> <p>(<i>n</i>) <i>Abbakke Heggadithi v. Kinhiamma Shetty</i> (1906) 29 Mad. 491, 496; <i>P.C. Pl. v. K.A.L.R. Firm</i> (1923) 1 Rang. 460.</p> <p>(<i>o</i>) <i>Umarkhan v. Salekhan</i> (1892) 17 Bom. 106, 113.</p> <p>(<i>p</i>) "The Courts do not lean towards compound interest, they do not award it in the absence of stipulation; but where there is a clear agreement for its payment it is, in the absence of disentitling circumstances, allowed": <i>Hari Lahu Patil v. Ramji Valad Pandu</i> (1904) 28 Bom. 371, 377.</p> |
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the meaning of this section (q). But a stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty within the meaning of this section, and would be relieved against. As observed by the Judicial Committee, in *Sunder Koer v. Rai Sham Krishen* (r), "compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty."

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III. Stipulations for payment of interest if principal not paid on due date.—These are cases where the bond does not provide for payment of two rates of interest, one lower and the other higher, but for the payment of interest at one specified rate if the principal money or part thereof is not paid within a stipulated period. To such cases s. 2 of Act 28 of 1855 would seem to apply. That Act abolished all usury laws and s. 2 of the Act provides that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable." The section refers to a single rate of interest and therefore cases under stipulation I, where there are two rates of interest, the original rate and the enhanced rate, are outside its scope. But stipulation III like s. 2 of the Act of 1855 refers to a single rate of interest and the difficulty is to reconcile sec. 2 of the Act of 1855 with s. 74 in its application to cases under stipulation III. Is the effect of the section to deprive the Court of jurisdiction to give relief in cases where there is a stipulation for an exorbitant rate of interest in default of payment of principal? On this point there were many conflicting decisions, but it is now generally agreed that the words of s. 74 "if the contract contains any other stipulation by way of penalty" are wide enough to cover cases under this stipulation.

IV. Stipulations for payment of interest at a lower rate, if interest paid regularly on due dates.—Where a bond provides for payment of interest at 24 per cent. per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 18 per cent. per annum, the creditor is entitled on failure of payment of interest on the due date to interest at the higher rate of 24 per cent. per annum. Such a clause is not in the nature of a penalty (s).

- (q) *Ganga Dayal v. Bachhu Lal* (1902) 25 All. 26; *Surya Narain v. Jagendra Narain* (1892) 20 Cal. 360; *Malli Chettiar v. Veeranna Tevan* (1921) 41 Mad. L.J. 470.
(r) (1906) 34 Cal. 150, at p. 158, L.R. 34 I. A. 9; *Mangat Rai v. Babu Singh* (1927) 8 Lah. 721, 103 I. C. 437, ('27) A. L. 445.

- (s) *Kutub-Ud-Din v. Bashir-Ud-Din* (1910) 32 All. 448; *Fitz Holmes v. Bank of Upper India, Ltd.*, (1923) 4 Lah. 258; *Administrator-General of Burma v. Moola* (1927) 5 Rang. 573, 105 I. C. 592, ('28) A. R. 19; *Wallinford v. Mutual Society* (1880) 5 App. Cas. 685, 702.

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V. Stipulations for payment of interest from date of bond, the rate of interest being exorbitant.—The question to be considered under this head is, whether a stipulation for payment of interest can be deemed a “stipulation by way of penalty” within the meaning of this section, if the bond provides for payment of interest at one rate from the date of the bond, and that rate is high and exorbitant. This may be put in the form of an illustration thus:—*A* borrows Rs. 500 from *B* on 15th October, 1930, and gives him a bond for that amount promising to pay the principal with interest thereon at the rate of 75 per cent. per annum on 15th January, 1931. *A* does not repay the loan on 15th January, 1931. *B* sues *A* to recover the amount of the loan with interest at 75 per cent. per annum. Is *B* entitled to interest at the rate of 75 per cent. per annum, or has the Court power under this section to reduce the rate of interest? It has been held by the High Court of Calcutta that whether the stipulation to pay interest at the rate of 75 per cent. per annum is a stipulation by way of penalty is a question of fact depending on the circumstances of each case, and if the Court finds that the rate of interest is of a penal character, the Court has power under this section to grant relief (t). On the other hand, it has been held by the High Court of Madras that the present section does not apply to cases like the above, the reason given being that there cannot be a stipulation by way of penalty unless there is another antecedent promise (u). The Madras decisions, it is submitted, are correct. The Patna High Court has taken much the same view as the Madras High Court (v). Cases of the kind now under consideration arising since the enactment of the Usurious Loans Act, 1918, will be dealt with under that Act, sec. 3 of which empowers the Court to relieve against exorbitant interest where (1) the interest is excessive, and (2) the transaction was substantially unfair.

Deposit of agreement for purchase.—Forfeiture of earnest money by a defaulting purchaser is not a penalty; but a term that a lump sum shall be paid in addition is penal, and only actual damage can be recovered under it (w).

“Reasonable compensation.”—The words of the section give a wide discretion to the Court in the assessment of damages. “The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of

(t) *Krishna Charan v. Sanat Kumar Das* (1917) 44 Cal. 162 [rate reduced from 75 per cent. to 15 per cent.]; *Abdul Majed v. Khirode Chandra Pal* (1914) 42 Cal. 690 [rate reduced from 60 per cent. compound interest to 30 per cent. simple interest].

(u) *Kesavulu v. Airthulai* (1913) 36 Mad. 533; *Najaf Ali Khan v.*

Muhammad Fazal Ali Khan (1927) 26 All. L. J. 210, 107 I. C. 249, ('28) A. A. 255, (rate reduced from 37 to 12 per cent.)

(v) *Nathuni Sahu v. Baijnath Prasad* (1917) 2 Pat. L. J. 212, pp. 216-218.

(w) *Pana Singh v. Arjan Singh* (P. G.) (1929) 31 Bom. L.R. 909, 117 I. C. 485, ('29) A. PC. 179.

reducing the amount of damages agreed upon is left unqualified by any specific limitation, though, of course, the expression 'reasonable compensation' used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles" (x). In the exercise of this discretion the Judicial Committee has affirmed a judgment giving, as reasonable in the particular case, compensation at the same rate as the increased interest stipulated for (y). And generally it is open to the Court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the Court to exceed what is reasonable (z). It has been held by the High Court of Bombay that the measure of damages for breach of a contract to borrow moneys at interest for a certain period is not the difference between the agreed rate of interest and that realized by the lender from his bankers *for the full period of the loan*, but only for such period as might be reasonably required to find another borrower of a similar amount at the agreed rate (a).

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Party rightfully rescinding contract entitled to compensation.

75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract (b).

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

This section is to be read as supplementary to secs. 39, 53, 55, 64 and 65. The facts of the illustration resemble those of illustration (a) to sec. 39. A party who rescinds on the ground of fraud or the like is in a different position; he rescinds the contract not because fulfilment has been refused or prevented, but because the contract, by reason of the fraud, or as the case may be, is altogether to his disadvantage.

(x) *Nait Ram v. Shib Dat* (1882) 5 All. 238, 242.

(y) *Sundar Koer v. Sham Krishen* (1906) 34 Cal. 150; L.R. 34 I.A. 9; *Chandi Charan v. Jivan Kumar* (1932) 53 Cal. L. J. 516, 132 I. C. 912, ('31) A.C. 772.

(z) *Abbake Heggadihi v. Kinkhiamma Shetty* (1906) 29 Mad. 491, 496.

(a) *Datubhai v. Abubakar* (1887) 12 Bom. 242.

(b) This section appears fairly to cover the right of a buyer who has paid

a deposit on sale to recover it back if the seller makes default, if any more specific authority is wanted than his remedy for breach of contract under the general provisions of s. 73. But as rightly observed in *Piari (or Pyare) Lal v. Mina Mal* (1928) 50 All. 82, 102 I.C. 766, ('27) A.A. 621, the right to recover money paid on a consideration which has failed is not exhausted by statutory specifications.

CHAPTER VII.

This chapter of the Act is wholly repealed by the Indian Sale of Goods Act, 1930, sec. 65, but the numbering of the later chapters and sections is not altered.

The Sale of Goods Act with commentary is printed at the end of the commentaries on the Indian Contract Act.

CHAPTER VIII.

Of Indemnity and Guarantee.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

"Contract of indemnity" defined.

Illustration.

A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Indemnity.—English usage of the word "indemnity" is much wider than this definition. It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor; in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction (c). A contract of insurance is a kind of contract of indemnity.

The present chapter applies in terms only to express promises; but it should be noted that a duty to indemnify may be annexed by operation of law to various particular kinds of contract (*cf.* s. 69, above). On the sale of shares in a company the transferee is bound to indemnify the transferor "against future calls, whether made by the company or by a liquidator. The liability of the transferor in the event of a winding up is exactly analogous to the case of lessee and assignee, the former of whom is liable for breaches of covenant committed by the latter, but, being only secondarily liable, has his remedy over against the person primarily liable, the assignee" (d).

(c) *Dugdale v. Levering* (1875) L. R. 10 C.P. 196

(d) *Roberts v. Crowe* (1872) L.R. 7 C.P.

629, 637, per Willes, J. See also *Kellock v. Enthoven* (1874) L.R. 9 Q.B. 241, Ex. Ch.

Commencement and Extent of Indemnifier's liability.—The text of the Act leaves these matters undefined, and in fact the leading English authorities are comparatively recent. Accordingly the Calcutta High Court has reviewed and followed them without citing the Contract Act at all (e). It might be supposed that an indemnifier could not be called on till the indemnified had incurred actual loss, and this was at one time said to be the rule of English Common Law. But, according to the equitable principles which now prevail, "to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given . . . if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance (f).

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Rights of indemnity-
holder when sued.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Sub-sec. 1.—This section represents the English law. As to sub-sec. 1, "It is obvious that when a person has . . . altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the

(e) *Osman Jamal & Sons, Ltd. v. Gopal Purshattam* (1928) 56 Cal. 262, 118 I.C. 882, ('29) A.C. 208.

(f) *Kennedy, L.J., in Liverpool Mortgage Insurance Co.'s Case* [1914] 2 Ch. 617, 638.

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indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive," although the promisor was not party to it (g). This rule has been followed by the Indian Courts (h).

Sub-sec. 2.—As to sub-sec. 2, "in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered" (i). But the costs must be such as would have been incurred by a prudent man (j).

Sub-sec. 3.—As to sub-sec. 3, "if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he [the defendant] may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity" (k).

Rights of promisor.—This section deals with the rights of a *promisee* in a contract of indemnity. There is no provision in the Act for the rights of a promisor in such a contract. The absence, however, of such a provision does not take away the rights which such a promisor has according to English law, and which are analogous to the rights of a surety declared in sec. 141 (l).

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety," the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

(g) *Parker v. Lewis* (1873) L. R. 8 Ch. 1035, 1059, per Mellish, L.J.

(h) *Nallappa v. Vridhachala* (1914) 37 Mad. 270. And the promisee has a cause of action as soon as a decree is passed against him; *Ohiranjil Lal v. Naraini* (1919) 41 All. 395.

(i) *Bepin v. Chunder Seekur Mookerjee*

(1880) 5 Cal. 811.

(j) *Gopal Singh v. Bhawani Prasad* (1888) 10 All. 531.

(k) Mellish, L. J., L.R. 8 Ch. at p. 1059, *supra*.

(l) See *Maharana Shri Jasvatsingji Fatesingji v. The Secretary of State for India* (1889) 14 Bom. 299, 303.

✓ The contract of guarantee presupposes a principal debtor (*m*); the surety's obligation must be substantially dependent on a third person's default (*n*). A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity (*o*). "Contracts of suretyship . . . require the concurrence of three persons, namely, the principal debtor, the creditor, and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor," on the true construction of sec. 141 as well as sec. 126. Accordingly, if *A* enters into a contract with *B*, and *C*, without any communication with *B*, undertakes for a consideration moving from *A* to indemnify *A* against any damage that may arise from a breach of *B*'s obligation, this will not make *C* a surety for *B* or give him a right of action in his own name against *B* in the event of *B*'s default (*p*).

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"Liability."—By the word "liability" in this section is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation (*q*).

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Consideration
guarantee.

for

Illustrations.

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

(m) *Mountstephen v. Lakeman* (1871)
L. R. 7 Q.B. 196, 202, Ex. Ch.,
affirmed in House of Lords, L. R.
7 H.L. 17.

(n) *Harburg India Rubber Comb Co. v.*
Martin [1902] 1 K.B. 778 C. A.

(o) *Guild & Co. v. Conrad* [1894] 2
Q.B. 885.

(p) *Periamanna Marakkayar v. Banians*
& Co. (1925) 49 Mad. 156, 172,
185, 95 I.C. 154, ('26) A. M. 544.

(q) *Manju Mahadev v. Shivappa* (1918)
42 Bom. 444.

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Consideration for a contract of guarantee.—This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor's request, and it is immaterial whether there is or is not any apparent benefit to the promisor (r).

Like any other contract, a contract of suretyship may be invalidated by total failure of the consideration, as where the consideration for an intended guarantee was postponing the sale of the debtor's goods, but the creditor was unable to stop the sale for want of the consent of other necessary parties (s), or where the consideration was withdrawal of a criminal prosecution against the debtor, but the Court would not sanction the withdrawal as the offence was not compoundable (t).

Where *A* advanced money to *B* on a bond hypothecating *B*'s property and mentioning *C* as surety for any balance that might remain due after realization of *B*'s property, and *C* was no party to the bond, but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration (u). The mere fact that *A* lends money to *B* on the recommendation of *C* is no consideration for a subsequent promise by *C* to pay the money in default of *B* (v).

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Surety's liability.

Illustration.

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Additional Illustration.

[*A* guarantees to *C* the payment of rent becoming due from *B* to *C*. *B* fails to pay the rent. *A* is liable for the rent, but not for interest on the rent, unless the bond contained some such words as "with interest thereon" *Maharaja of Benares v. Har Narain Singh* (1906) 28 All. 25.]

✓ **Proof of surety's liability.**—The liability must be proved against the surety in the same way as against the principal debtor. A judgment or

- (r) *Sornalinga v. Pachai Naickan* (1915) 38 Mad. 680; *Pestonji v. Bai Meherbai* (1928) 30 Bom. L.R. 1407, 112 I.C. 740, (28) A. B. 539.
(s) *Cooper v. Joel* (1859) 1 D. F. & J. 240.

- (t) *Het Ram v. Devi Prasad* (1881) 1 All. W.N. 2.
(u) *Nanak Ram v. Mehin Lal* (1877) 1 All. 487.
(v) *Muthukaruppa v. Kathappudayan* (1914) 27 Mad. L.J. 249.

award against the principal is not admissible as against the surety without a special agreement to that effect. The present section is merely a re-enactment of the Common Law (w).

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Liability for whole or part of debt.—A surety may limit his guarantee to a fixed sum. If the debt is an ascertained sum exceeding that sum, the presumption is that the surety guarantees the whole amount but limits his liability to the fixed sum. But if the debt is a floating balance including sums to become due in the future, the presumption is that the surety guarantees not the whole debt but a part of the debt equal to the fixed sum. This is because it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety (x). If the guarantee is of the whole debt the surety does not acquire rights of subrogation or contribution (see secs. 140, 141 and 146) until he has paid the whole of the fixed sum to which he has limited his guarantee. If the guarantee is for a part of the debt the surety is entitled to the benefit in rateable proportion of any dividends paid by the estate of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety, though the principal has not been sued (y).

Surety's liability where original contract is void or voidable.—This section only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. And where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so-called surety is not a collateral, but a principal, contract (z).

Limitation.—The payment of interest by a debtor before the expiration of the period of limitation does not give a fresh starting point for limitation against the surety under sec. 20 of the Limitation Act, even in the absence of a prohibition by the surety against the payment of interest by the debtor on

(w) *Hajarimal v. Krishnarav* (1881) 5 Bom. 647, 650.

(x) *Ellis v. Emanuel* (1876) 1 Ex. Div. 157, 163, *Cur. per Blackburn, J.*

(y) *Sankana v. Virupakshapa* (1883) 7

Bom. 146; *Depak Datt Chaudhari v. Secy. of State*, 118 I.C. 443, ('29) A.L. 393.

(z) *Kashiba v. Shripat* (1894) 19 Bom. 697; *Indar Singh v. Thakur Singh* (1921) 2 Lah. 207.

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his account. Payment of interest by the debtor could not be regarded as made by a person liable to pay the debt, nor can the surety be, for the purpose of that section, considered the agent of the principal duly authorized to pay the interest (a).

See also the commentary on sec. 134.

"Continuing
antee."

129. A guarantee, which extends to a series of transactions is called a "continuing guarantee."

Illustrations.

(a) *A*, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee. [See *Durga Prya Chowdhury v. Durga Pada Roy* (1928) 55 Cal. 154, 109 I.C. 752, ('28) A. C. 204, where this illustration is relied on.]

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £100 and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100. [Facts simplified from *Wood v. Priestner* (1867) L.R. 2 Ex. 66, 282.]

(c) *A* guarantees payment to *B* of the price of five sacks of flour, to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C* which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks. [*Kay v. Groves* (1829) 6 Bing. 276.]

Continuing guarantee.—Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, "as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written" (b). A guarantee in this form: "*I, M*, will be answerable for £50 sterling that *Y*, butcher, may buy from *H*," was held to be a continuing guarantee to the extent of £50 when it appeared from the circumstances that the parties contemplated a continuing supply of stock to *Y*, in the way of his trade. In construing the language of the parties the whole of their expressions must be looked to not merely the operative words.

(a) *Gopal Daji v. Gopal Bin Sonu* (1903) 28 Bom. 248.

(b) *Bobill, C.J., Coles v. Pack* (1869) L.R. 5 C.P. 65, 70.

✓ A guarantee of the faithful discharge of his duties by a person appointed to a place of trust in a bank is not a continuing guarantee (c). Neither is a guarantee for the payment of a sum certain by instalments within a definite time, a continuing guarantee (d). The first is a guarantee of an appointment and the second is a guarantee of a loan.

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Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notices to the creditor.

Illustrations.

(a) *A*, in consideration of *B*'s discounting, at ~~*A*~~^{*C*} request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

Future transactions.—The words "future transactions" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transactions is contemplated. It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee . . . the guarantee cannot be annulled during the continuance of that relationship"; and as the surety cannot determine it himself by notice, so his death does not relieve his estate from liability unless the nature of the transaction implies a contract to the contrary under sec. 131.

But a material change in what we may call the guaranteed situation may justify a revocation. Thus, in the common case of a continuing guarantee for a servant's honesty, proved dishonesty on the servant's part entitled the surety to say: "After this you must employ such a man, if you will, at your own peril" (e).

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Revocation of continuing guarantee by surety's death.

(c) *Sen v. Bank of Bengal* (1920) 47 I.A. 164.

(d) *Bhagvandas v. Secretary of State* (1926) 28 Bom. L.R. 662, 96 I.C.

248, (26) A.B. 465.

(e) *Phillips v. Foxall* (1872) L.R. 7 Q.B. 666, 677, 681.

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131, 132 "Contract to the contrary."—The English rule appears to be that where there is a guarantee subject to revocation by notice, and the surety dies without having revoked it, notice of his death to the creditor operates as a revocation (f). But this does not govern the construction of the present section (g). An express provision that a guarantor or his representatives may determine the guarantee by notice is an example of such a contract to the contrary as this section contemplates; in such a case mere notice of the death will not be enough (h).

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons, primarily liable, not affected by arrangements between them that one shall be surety on other's default.

Illustration.

A and *B* make a joint and several promissory note to *C*. *A* makes it in fact as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

Joint debtors and suretyship.—Where one of two joint debtors is, to the knowledge of the creditor, in fact a surety for the other as between themselves, his immediate liability to the creditor is not qualified, but he is entitled to the rights of a surety under sections 133, 134, 135. ("When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors." That appears to me to be the law as settled by the judgments of this House in *Oakeley v. Pasheller* (i) and *Overend, Gurney & Co. v. Oriental Financial Corporation* (j).) This includes the case where one member of a firm retires and another continues the business and agrees to indemnify the outgoing partner.

(f) *Coulthart v. Clementson* (1879) 5 Q.B.D. 42.

(g) *Durga Priya Chowdhury v. Durga Pada Roy* (1928) 55 Cal. 154, 159, 109 I.C. 752, ('28) A.A. 204.

(h) *Re Silvester* [1895] 1 Ch. 573.

(i) (1836) 4 Cl. & F. 207, 42 R.R. 1.

(j) (1874) L.R. 7 H.L. 348, per Lord Watson, *Rouse v. Bradford Banking Co.* [1894] A. C. 586, 598.

The provisions of this section do not apply where the liability undertaken is not the same. A party who accepts bills of exchange for the accommodation of another is not precluded by this section from pleading that he was an accommodation acceptor only. See Negotiable Instrument Act, 1881, secs. 37, 38.

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133. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety
by variance in terms of
contract.

Illustrations.

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payment shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st March.

Variation of contract between creditor and principal.—This is a rule of long standing, thus expressed by Lord Cottenham: "Any variance

- S. 133 in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety" (k).

✓ Again it was laid down a generation later by a Judicial Committee :
 "A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety has guaranteed" (l).

The only qualification (for it is not an exception) to the generality of the rule is that, where a guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the surety's liability as to the rest (m). The intention of a "settlement" contract, for repurchase of goods by the seller from the buyer, is not that the original contract shall be discharged but that the two contracts shall stand together (n); accordingly, a contract of re-sale to the vendor does not discharge a surety from his original contract (o). A stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive him of his right to discharge under this section (p).

A becomes surety to C for payment of rent by B under a lease. Afterwards B and C contract, without A's consent, that B will pay rent at a higher rate. A is discharged from his suretyship in respect of arrears of rent accruing subsequent to such variance (q).

An attempted variance which is inoperative, as being against the local law applicable as between the creditor and the principal debtor, will not discharge the surety. A Canadian banker's loan and interest were guaranteed; the bank increased the rate of interest from 7 to 8 per cent., 7 per cent. being the highest the bank could legally charge in Canada; the guarantors remained bound for principal and lawful interest (r). But it is for the promisee to show performance of the contract before he can hold the promisor to his promise, and therefore even though an attempted variance is invalid in law, the guarantor will not be held liable if the promisee has failed to perform the original contract (s).

(k) 3 H.L. C. at pp. 238, 239.

(l) *Ward v. National Bank of New Zealand* (1883) 8 App. Ca. 755, 763.

(m) *Skillett v. Fletcher* (1866-67) L.R. 1 C.P. 217, 2 C.P. 469.

(n) *Uttam Chand Saligram v. Jawa Mamooji* (1919) 46 Cal. 534, 542.

(o) *Uderam v. Shiobhajan* (1920) 22

Bom. L.R. 711.

(p) *Chitguppi & Co. v. Vinayak Kashinath* (1921) 45 Bom. 157.

(q) *Khatun Bibi v. Abdullah* (1880) 3 All. 9.

(r) *Eghert v. National Crown Bank* [1918] A.C. 903.

(s) *Pratapsingh v. Keshavlal* (1935) 62 I. A. 23, 59 Bom. 180, 37 Bom. L.R. 315, 163 I. O. 700, ('35) A. PC. 21.

✓ If the surety has mortgaged his property as security for his guarantee, any variance in the contract between the creditor and the principal debtor will discharge the surety from liability and release the property mortgaged (t). The property will be released even if the surety has not made himself personally liable (u).

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134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of surety
by release or discharge
of principal debtor.

Illustrations.

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land, and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land, and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

2m ✓ **Creditor's discharge of principal debtor.**—"The law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged" (v).

But it is to be observed, with regard both to this and to the following section, that if the creditor expressly reserves his remedies against the surety, or generally his securities and remedies against persons other than the principal debtor, the surety is not discharged. In England this is as well settled as the main rule; and it is really quite consistent with the terms of the present section. The surety's right to indemnity against the principal

(t) *Bolton v. Salmon* (1892) 2 Ch. 48.

(u) *Smith v. Wood* (1929) 1 Ch. 14;

Jagjivandas v. King Hamilton & Co. (1931) 55 Bom. 677, 33 Bom.

L. R. 709, 134 I. C. 545, ('31) A. B. 337.

(v) *Kelley, C. B., in Cragos v. Jones* (1873) L.R. 8 Ex. 81, 82.

S. 134 debtor is a necessary result of such a reservation. If a creditor, without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt, this does not discharge the other surety (*w*).

But where there is a final and full release of the principal debtor by a complete novation or otherwise, "the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone." Acceptance of a new debtor instead of the old one puts an end to the liability of a surety for the old debt (*x*).

"Act or omission of the creditor."—The acts or omissions contemplated by this section may be those referred to in secs. 39, 53, 54, 55, 63 and 67 (*ante*). If the principal debtor is discharged from his obligation by reason of any acts or omissions specified in those sections, the liability of the surety will determine. But the act or omission must be one of which the legal consequence is the discharge of the principal debtor.

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Creditor's omission to sue principal within limitation period.—The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there are two opposite views taken by the Indian High Courts. On the one hand, it has been held by the High Courts of Bombay (*y*), Calcutta (*z*), Madras (*a*), Lahore (*b*) and Rangoon (*c*) that the surety is not under such circumstances discharged from liability to the creditor; the High Court of Allahabad (*d*), and the Judicial Commissioner's Court at Peshawar (*e*), on the other hand, have held that the surety is discharged. The conflict arises in great part from the provisions of sec. 137, and especially the words "mere forbearance" occurring in that section. It is conceded by the Bombay and Calcutta High Courts, that, if sec. 134 stood alone, the omission of a creditor to sue the principal debtor within the period of limitation would discharge the surety under that section, as having the legal consequence of discharging the principal debtor, but the Madras High Court relies on the well-known distinction between the barring of the remedy by action and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason, that

- (*w*) *Bhagwandas v. Secretary of State* (1926) 28 Bom. L.R. 662, 96 I. C. 240, ('26) A. B. 465.
 (*z*) *Commercial Bank of Tasmania v. Jones* [1893] A. C. 313, 316.
 (*y*) *Hajarimal v. Krishnarav* (1881) 5 Bom. 647.
 (*z*) *Krishito Kishori Chowdhraim v. Radha Romun* (1885) 12 Cal. 330.
 (*a*) *Subramania v. Gopala* (1909) 33 Mad. 308.
 (*b*) *Dil Mahammed v. Sain Das* 100 I. C. 922, ('27) A.L. 396; *Bharat*

- National Bank v. Thakar Das* (1935) 16 Lah. 757, 156 I.C. 553, ('35) A. L. 729; *Nur Din v. Allah Ditta* (1931) 12 Lah. 546, 133 I.C. 628, ('32) A. L. 419.
 (*c*) *U. Ba Pe v. Ma Lay* (1932) 10 Rang. 398, 139 I.C. 138, ('32) A. R. 88.
 (*d*) *Ranjit Singh v. Naubat* (1902) 24 All. 504. See also *Salig Ram Misir v. Lachmar Das* (1928) 50 All. 211, 107 I.C. 42, ('28) A. A. 46.
 (*e*) *Chattar Singh v. Makhan Singh* ('36) A. Pesh. 20.

"the surety can himself set the law in operation against the debtor" (f). It seems that the opinion of the majority of the High Courts, fortified by a judicial dictum of great weight in the English Court of Appeal, must be accepted as correct. Ss.
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135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

Contract to give time to principal debtor.—The general principal was thus stated in the earliest decision on this subject: ("It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him" (g).)

A contract whereby the creditor promises to give time to the principal debtor must be distinguished from an unconditional contract not to sue him. In the former case, the remedy of the creditor is merely suspended until the determination of the fixed period; in the latter case the principal debtor is completely released from his obligation so as to entitle the surety to a discharge under sec. 134, apart from the specific provisions of this section. In either case, the mere formation of the contract is sufficient to operate as a discharge of the surety irrespective of any forbearance that may be exercised under it. The reason of this rule appears to be that a surety has a right, immediately on the debt becoming due, to insist upon proceedings being at once taken by the creditor against the principal debtor, and any contract that would prevent the creditor from suing him would be inconsistent with that right (s. 139) (h). A consent decree, made without the surety's consent for payment by instalments of the sum due from the principal debtor, is a composition such as to discharge the surety (i). It is not necessary that the contract should be express; a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. Thus the acceptance of interest in advance by a creditor operates as a general rule as an agreement to give time to the principal debtor and consequently as a discharge to the surety; for the creditor is in that event precluded from suing the principal until the time covered by the payment in advance has expired (j).

(f) Per Lindley, L. J., *Carter v. White* (1883) 25 Ch. Div. 666, 672.

(g) *Rees v. Berrington*, 2 Ves. Jr. 540 (Lord Loughborough).

(h) See *Protab Chunder v. Gour Chunder* (1878) 4 Cal. 132, 134.

(i) *National Coal Co. v. Kshitish Bose &*

Co. (1926) 30 C.W.N. 540, 95 I. G. 409, ('26) A. C. 818; *Mahomedali Ibrahimji v. Lakshmi Bai Anant Palande* (1930) 54 Bom. 118, 31 Bom. L. R. 1442, 124 I. C. 227, ('30) A. B. 122.

(j) *Kali Prasanna v. Ambica Charan* (1872) 9 B.L.R. 261.

Ss. 135, 136 ✓ **Contrary agreement.**—The operation of the rules as to giving time to the principal debtor may be excluded by express agreement. If the instrument creating the debt and the suretyship declares that the surety or sureties shall be taken, as between themselves and the creditor, to be principal debtors, and shall not be released by reason of time being given, or of any other forbearance, act, or omission of the creditor which, but for this provision, would discharge the sureties, then any defence on these grounds is effectually barred, and it is unnecessary to consider whether the facts would otherwise raise it (*k*).

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

In the above illustration *C* is the creditor, *B* is the principal debtor and *A* is surety for *B*. If *C* agrees with *B* to give time to *B*, the contract between *C* and *B* for which *A* stood surety is varied and *A* is no longer liable. But if *C* contracts with a stranger *M* to give *B* time, that is a contract which *B* cannot enforce. *B*'s liability under his contract with *C* is not affected and *A* is not discharged. In an English case the law was stated as follows :

“It is clear that when the creditor enters into a binding contract with the principal debtor to give him time without the assent of the sureties, and without reserving his remedy against the sureties, such giving of time discharges the sureties But, to produce this result, two things are necessary. There must be a binding contract to give time, capable of being enforced ; and the contract must be with the principal debtor. If merely made with a third party it will not do, as was decided in *Frazer v. Jordan* (*l*), where in an action by the holder against the drawer of a bill of exchange it was held to be no defence to the drawer that the holder had, without the drawer's consent, made a binding contract with a third party to give time to the acceptor, in consideration of an undertaking by the third party to see the bill paid (*m*).” If there is no contract with the principal debtor to give time, the mere taking of additional security does not discharge the surety (*n*).

(*k*) *Greenwood v. Francis* [1899] 1 Q.B. 312 C.A.

(*l*) 8 E. & B. 303.

(*m*) *Clarke v. Bisley* (1889) 41 Ch. J. 422,

434, per North, J.

(*n*) *T. N. S. Firm v. Mahomed Hussain* (1934) 57 Mad. 398, 146 I.C. 608, ('33) A. M. 756,

- 137.** Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. Ss.
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- Creditor's forbearance to sue does not discharge surety.

Illustration.

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

"**Mere forbearance.**"—Section 135 enacts that a contract between the creditor and the principal debtor by which the creditor promises not to sue the principal debtor discharges the surety. But there must be a positive agreement not to sue and mere neglect to sue will not discharge the surety (o). The illustration refers to failure to sue before the period of limitation has expired. The case where the creditor fails to sue until the period of limitation has expired is dealt with in the note to s. 134.

- 138.** Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.
- Release of one co-surety does not discharge others.

Release of one of several sureties.—This section is a necessary consequence of the principal laid down in sec. 44 and must be taken as a deliberate extension of a rule which in the common law is limited to the case of co-sureties contracting severally and not jointly.

- 139.** If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.
- Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

Illustrations.

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment.

(o) *Oriental Financial Corporation v. Overend, Gurney & Co.* (1871)

L. R. 7 Ch. 142, 150 (Lord Hatherley).

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(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done, as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

✓ **Act or omission of creditor tending to impair surety's remedy.**—The injurious quality to be considered is tendency to diminish the surety's remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety may object. "In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security" (*p*).

But mere passive acquiescence by the creditor in irregularities on the part of the principal debtor such as laxity in the time and manner of rendering accounts by a collector of public moneys whose fidelity is guaranteed, will not of itself discharge the surety (*q*).

The employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work (*r*). If the employer of a servant whose fidelity has been guaranteed continues to employ him after a proved act of dishonesty, the surety is discharged (*s*).

Act or omission impairing surety's eventual remedy.—The case in which a party is discharged by an act or omission of the creditor, of which the legal consequence is the discharge of the principal debtor, has been dealt with in sec. 134 above. Under the present section a surety will be discharged by acts or (subject to the caution above given) omissions of the creditor

(p) Lord Langdale, *Calvert v. London Dock Co.*, 2 Keen at p. 644.

(q) *Mayor of Durham v. Fowler* (1889) 22 Q.B.D. 394.

(r) *Mayor of Kingston-upon-Hull v. Harding* [1892] 2 Q.B. 494 C.A.

(s) *Phillips v. Foxall*, L.R. 7 Q.B. 666.

specified therein which, though not having the legal consequence of discharging the principal, impair the eventual remedy of the surety against him (i).

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As to negotiable instruments, it is specially provided by Act XXVI of 1881, sec. 39, that where the holder of a negotiable instrument without the consent of the indorser destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Rights of surety on
payment or performance.

This section lays down a general principle of which the most important practical application is to be found in sec. 141. It seems that the intention of the Act is to keep alive for the surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of the debt or performance of the duty.

"When a surety is only a surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged" (u). In such a case it may be said that "the right of the surety arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole". But a surety who has become such, though with limited liability, in respect of the entire debt, has no rights by way of subrogation or in preference to the creditor until the creditor is fully paid (v).

Moreover, the benefit of this principle is intended for persons who, though not actually sureties, are in an analogous position. The indorser of a bill of exchange "is primarily liable as principal on the bill, and is not strictly a surety for the acceptor"; but "he has this in common with a surety for the acceptor, that" after notice of dishonour "he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor" (w).

See as to the right of a payer of a bill of exchange for the honour of any party liable upon it the provisions of the Negotiable Instruments Act XXVI of 1881, sec. 114.

(i) See *Pogose v. The Bank of Bengal* (1877) 3 Cal. 174; *Ghuznavi v. National Bank of India* (1916) 20 C.W.N. 562.

(u) *Gray v. Secktham* (1872) L. R. 7 Ch. 680, 683, per Mellish, L. J.

(v) *Re Sass* [1896] 2 Q. B. 12, 15; he

becomes only a creditor of the principal debtor for what he has paid: *Darbari Lal v. Mahbub Ali Mian* (1927) 49 All. 640, 101 I. C. 513, ('27) A.A. 538.

(w) *Duncan Fox & Co. v. North and South Wales Bank* (1880) 6 App. Cas. 1, 18.

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141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Surety's right to benefit of creditor's securities.

Illustrations.

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture. [Cf. *Pearl v. Deacon* (1857) 1 De G. & J. 461, where the creditor, being also the debtor's lessor, destroyed the security on the furniture by distraining for rent (which in English law is a paramount right).]

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

Surety's right to benefit of securities.—The law in England is different. It has been stated as follows:—"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship (x), if the creditor who has, or ought to have had, them in his full possession or power loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released, if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands" (y).

It will be seen that the present section, by limiting the surety's right to securities held by the creditor at the date of his becoming surety, has adopted a view which in England has now been treated as untenable.

(x) See judgment of Hall, V.-C., in *Forbes v. Jackson* (1882) 19 Ch. D. 615, 619.

(y) Notes to *Rees v. Berrington* (1795)

in 2 Wh. & T. L. C. as approved by Hannen, J., *Wulff v. Jay* (1872) L. R. 7 Q. B. 756, 764.

The rule is not confined to securities in any technical sense. A surety is entitled to the benefit of the principal debtor's set-off against the creditor, if it arises out of the same transaction; this follows from the surety's right to be indemnified by his principal, combined with the equitable maxim of avoiding circuity of action (z).

The High Court of Bombay has cited the reason of the present rule as laid down by Turner, V.-C. (a): "I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety [see s. 145, below]; and it is, as I conceive from this obligation that the right of the surety to the benefit of securities held by the creditor is derived."

✓ "To the extent of the value of the security."—Where a creditor sued the principal debtor and the surety on a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property which was worth the amount guaranteed by the surety, it was held that the surety was discharged (b).

When surety becomes entitled to benefit of creditor's securities.—This point arose in *Goverdhandas v. Bank of Bengal* (c), where it was held that a surety was not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. In that case a surety who had guaranteed *an aliquot* and defined portion of a past due debt secured by a mortgage, claimed to be entitled, *on payment by him of the portion of the debt* which he had guaranteed, to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgagee had been paid the full amount of his mortgage debt. The Court held that the right of the creditor to hold his securities until the whole debt is discharged is paramount to the surety's claim upon such securities; and that the surety claim could only arise when the creditor's claim against such securities is satisfied. Farran, J., in rejecting the surety's claim said: "It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety; or that a person advancing say Rs. 10,000 on a mortgage which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think,

(z) *Bechervaise v. Lewis* (1872) L. R. 7 C. P. 372.

(a) *Yonge v. Reynell* (1852) 9 Hare, at pp. 818, 918; *Goverdhandas v. Bank of Bengal* (1890) 15 Bom. 48,

63.

(b) *Narayan v. Ganesh* (1870) 7 B. H. C. A. C. 118.

(c) (1890) 15 Bom. 48.

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defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which has that effect. If such were the result of sec. 141 of the Contract Act, I should expect to find the wording of sec. 140 repeated in sec. 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention" (d).

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained
by misrepresentation
invalid.

The English authorities on the subject-matter of this and sec. 143 will be dealt with together under that section.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Guarantee obtained
by concealment in-
valid.

Illustrations.

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence, calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

Guarantee obtained by misrepresentation or concealment.—English law is settled that, although the contract of suretyship is "one in which there is no universal obligation to make disclosure"—that is, it is not, like a contract of insurance, liable to be avoided by the mere non-disclosure of any material fact whatever—still the surety is entitled to know so much as will tell him what is the transaction for which he is making himself answerable; and he will be discharged if there is either active misrepresentation of the matter by the creditor, or silence amounting in the circumstances to misrepresentation. "Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid" (e).

Thus where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee and the

(d) *Goverdhandas v. Bank of Bengal*
(1890) 15 Bom. 48 at p. 64.

(e) *Fry, J., Davies v. London and*

Provincial Marine Insurance Co.
(1878) 8 Ch. D. 469, 475.

statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part (f).

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To avoid a guarantee under this section it must be proved not only that there was silence as to a material circumstance, but that the guarantee was obtained by means of such silence (g). The meaning of the words "keeping silence" in this section was considered by Sargent, C.J., in a Bombay case (h). The expression "keeping silence," said the learned Judge, "clearly implies intentional concealment as distinguished from mere non-disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Co. v. Lloyd* (i), that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed."

144. Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Guarantee on contract that creditor shall not act on it until co-surety joins.

A surety who "entered into the obligation upon the understanding and faith that another person would also enter into it....has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety" (j).

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise to indemnify surety.

Illustrations.

(a) *B* is indebted to *C* and *A* is surety for the debt. *C* demands payment from *A* and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(f) *Lee v. Jones* (1863) 17 C. B. N. S. 482, Ex. Ch.

(g) Per Cur. in *Secretary of State for India v. Nilamekam* (1883) 6 Mad. 406, 408.

(h) *Balkrishna v. Bank of Bengal* (1891) 15 Bom. 585, 591.

(i) 10 Ex. 523, 532.

(j) *Evans v. Bremridge* (1856) 8 D. M. G. 100, 109.

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(b) *C* lends *B* a sum of money, and *A* at the request of *B* accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

Surety's right to indemnity.—The proposition "that as soon as his obligation to pay is become absolute, [a surety] has a right in equity to be exonerated by his principal" (*k*), is treated throughout the English authorities as fundamental, and as furnishing the reason for several of the more specific rules. Further, it has long been settled in England that "a surety is entitled to come" to the Court "to compel the principal debtor to pay what is due from him," provided that an ascertained debt is actually due; and this relief is not limited, as at one time supposed, to cases where the creditor has refused to sue the principal debtor (*l*).

The surety's only claim is to be fully indemnified and the English rule is followed that the right to indemnity arises as soon as the obligation to pay becomes absolute (*m*). He cannot compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the full amount. "Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the common obligation" (*n*).

"Whatever sum he has rightfully paid."—This expression includes "not only coin, but also property, of whatever kind, which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him" (*o*). Therefore if the creditor accepts in discharge of the debt a promissory note executed by the surety and another person, that is not equivalent to a payment of the

(*k*) *Bechervaise v. Lewis* (1872) L. R. 7 C. P. 372, 377.

(*l*) *Ascherson v. Tredegar Dry Dock, etc., Co.* [1909] 2 Ch. 401, 406.

(*m*) *Sripatrao v. Shankarrao* (1930) 32 Bom. L. R. 207, 127 I. C. 330, ('30) A.B. 331.

(*n*) *Reed v. Norris* (1837) 2 My. & Cr. 361, 375, (Lord Cottenham). On

the point that there is no subrogation, cf. *Periamanna Marakkayar v. Banians & Co.* (1925) 49 Mad. 156, 95 I. C. 154, ('26) A.M. 544.

(*o*) Per Bhashyam Ayyangar, J., in *Putti Narayanamurthi v. Mari-muthu* (1902) 26 Mad. 322, 328.

debt by the surety (*p*). The reason is that, the principal debtor being bound to indemnify the surety, the cause of action cannot be merely the procuring by the surety of the principal debtor's exoneration from liability to the creditor, but must also include the surety being himself damnified (*q*); and the surety cannot be said to be damnified unless the payment is actually made.

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Guarantee without concurrence of principal debtor.—Where a person becomes a surety without the knowledge and consent of the debtor, the only rights which he acquires are those given by secs. 140 and 141, and not those given by this section (*r*).

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations.

(a) *A, B and C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A, B and C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A, B and C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A, B and C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees, and *C* 500 rupees.

Contribution by co-sureties.—This has long been elementary. The earliest case usually cited settled that co-sureties need not be bound under the same contract and laid down that the right to contribution is independent of any agreement for that purpose (*s*).

It must be observed that a "surety has no claim against his co-sureties until he has paid more than his share of the debt to the principal creditor" (*t*), for only then does it become certain that there is ultimately any case for contribution at all. But a judgment against the surety at the suit of the

(p) *Putti Narayanamurthi v. Marimuthu* (1902) 26 Mad. 322, 328.

(q) *Ibid*, 326.

(r) *Muthu Raman v. Chinna Vellayan* (1916) 39 Mad. 905.

(s) *Dering v. Earl of Winchilsea* (1787)

1 Cox, 318, and see other judgments cited by Wright, J., in *Wolmershausen v. Gullick* [1893] 2 Ch. 523 *Seq.*

(t) *Ex parte Snowden* (1881) 17 Ch. Div. 44, 48; *Shirley v. Burdett* [1911] 2 Ch. 418.

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creditor for the full amount of the guarantee (or an equivalent process, such as the allowance of a claim for the sum in the administration of the surety's estate) will have the same effect as payment for this purpose, and entitle the surety or his representatives to a declaration of the right to contribution.

All the co-sureties are entitled to share in the benefit of any security or indemnity which any one of them has obtained from the principal debtor, and this whether they knew of it or not (u). The surety bringing in, under this rule, what he receives from his security, may resort again to that security for the liability to which he remains subject, and the co-sureties may again claim the benefit of participation and so on until the co-sureties have been fully reimbursed or the counter security exhausted (v).

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations.

(a) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A, B and C* are each liable to pay 10,000 rupees.

(b) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B and C* 15,000 rupees each.

(c) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in a penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A, B and C* have to pay each the full penalty of his bond.

The wording of this section and its effect as shown by the illustrations is perfectly clear and the use of the words "equally" and not "rateably," shows an intention to make a deliberate departure from the rule as previously understood.

(u) *Steel v. Dixon* (1881) 17 Ch. D. 825.

(v) *Berridge v. Berridge* (1890) 44 Ch. D. 168.

CHAPTER IX.

Of Bailment.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

✓ *Nature of the transaction.*—"Bailment" is a technical term of the Common Law, though etymologically it might mean any kind of handing over (Fr. *bailler*). (It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. But constructive delivery will create the relation of bailor and bailee as well as actual, as stated in the Explanation.

✓ The bailee's duty to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arises on the delivery of the goods, although those orders may have already been given and accepted in such a manner as to constitute a prior special contract (*w*).

The words "otherwise disposed of" in the present section express the common law as now understood. "It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him," *e.g.*, a factor for sale (*x*). (On the whole a bailment may be described as a delivery on condition, to which the law usually attaches an obligation to re-deliver the goods, or otherwise deal with them as directed, when the condition is satisfied; but there may be, in particular cases, a bailment without an enforceable obligation (*y*).

✓ Where a chattel is delivered by mistake, the intention being to deliver another chattel either with or without conditions, the legal result, whatever it may be, is not a bailment; for there is no intention at all to deliver the chattel which is in fact delivered, and no contract with respect to it.

(*w*) *Streeter v. Horlock* (1822) 1 Bing. 34.

(*x*) See *Pollock and Wright on Possession*, pp. 161, 162.

(*y*) *Judgment of Cave, J., R. v. McDonald* (1885) 15 Q. B. D. at p. 328.

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No bailment where whole property transferred.—Obviously no transaction can be a bailment within the Act which does not satisfy the terms of this section. Accordingly there is not a bailment if the thing delivered is not to be specifically returned or accounted for : and this is also the Common Law.

A delivery of property on a contract for an equivalent in money or in other commodities (whether like the property delivered or not) is a sale or exchange and not a bailment, as where farmers deliver grain to a miller to be used by him in his trade, and are entitled to claim an equal quantity of corn of like quality or its market price (z).

An agent authorized to receive payment, and bound to hand over to his principal an equivalent sum, but not necessarily the actual coin, or instruments of credit received by him, is not a bailee (a).

Similarly the delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note is not a bailment, for there is no contract in such a case that the notes shall be returned or otherwise disposed of according to the directions of the owner (b).

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Delivery to bailee,
how made.

Compare Secs. 33, 34 of the Indian Sale of Goods Act, 1930.

The bailor's part need not be very active. Mere assent, for example, of a guest at a place of public entertainment to a servant's officious assumption of custody may be sufficient evidence of delivery to make the proprietor of the house a bailee and responsible for loss (c). The mere fact that a loading clerk at a Railway station enters the number of the package in the consignor's Forwarding note does not amount to registration or delivery of possession to the railway company. This was so held in a case where the consignor neglected to obtain a railway receipt or to leave the goods in the custody of the Railway company (d).

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to

Bailor's duty to
disclose faults in
goods bailed.

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|--|--|
| (z) <i>South Australian Insurance Co. v. Randell</i> (1869) L. R. 3 P. C. 101. | <i>v. Sheo Singh</i> (1880) 2 All. 756, 760. |
| (a) See <i>Bridges v. Garrett</i> (1870) L. R. 5 C. P. 451, in Ex. Ch. judgment of Blackburn, J. | (c) <i>Ultzen v. Nicols</i> [1894] 1 Q. B. 92. |
| (b) <i>Secretary of State for India in Council</i> | (d) <i>Lachmi Narain v. Bombay, Baroda & Central India Railway</i> (1923) 45 All. 235. |

extraordinary risks ; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

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If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

The facts in Illustration (a) to the section were thus referred to by the Court in a case in England :—"Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities and conceals them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible ? . . . By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him" (e). It is equally certain that a gratuitous lender is not liable for defects in the things lent of which he is not aware (f).

A person who delivers to a carrier goods which he knows to be of a dangerous character, such as explosives, and to require extraordinary care in handling, and omits to give warning of it (the nature of the goods not being apparent) is liable for any resulting damage (g). But this duty seems to be independent of the contract of bailment, and antecedent to the formation of any contract between the parties.)

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Care to be taken by
bailee.

This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established, by the judgment of Holt, C.J., in *Coggs v. Bernard* (h). By modern

(e) *Blakemore v. Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 1051.

(f) *MacCarthy v. Younge* (1861) 6 H. &

N. 329.

(g) *Lyell v. Ganga Dai* (1875) 1 All. 60.

(h) (1703) 2 Ld. Raym 909, 1 Sm. L. C. 173.

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English law a gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description (i); and it does not seem that in practice an ordinary bailee for reward is bound to anything more (j). Even a gratuitous bailee must use such skill as he actually possesses, or by his profession or condition may reasonably be expected to possess; a man who undertakes to show off a horse is presumed to be a competent rider (k).

A special and higher responsibility, not being part of the ordinary law of bailment at all, was imposed by the law of England upon common carriers and innkeepers.

Common carriers.—The provisions of secs. 151 and 152 of the Contract Act embody in effect the Common Law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods; in other words, the liability was one for *negligence* only, in the absence of special contract. Common carriers (l) and innkeepers, on the other hand, were liable as insurers of goods; that is they were responsible for every injury to the goods occasioned by *any means whatever*, except only the act of God and the King's enemies. Therefore the mere proof of delivery of goods and injury thereto, unless caused by the act of God or the King's enemies, was sufficient to entitle the plaintiff to compensation without proof of negligence on the part of the defendant (m). These principles of the English Common Law applied in India (n), but they were subsequently modified by legislation as respects common carriers, and the Carriers Act III of 1865 now enables a bailee of this class to limit his liability by special contract in the case of certain goods, but not so as to get rid of liability for negligence (o). The question about the liability of common carriers arose in a case before the Judicial Committee of the Privy Council in an appeal from the Court of the Recorder of Rangoon,

(i) *Giblin v. McMullen* (1869) L. R. 2 P. C. 317, 339.

(j) *Searle v. Laverick* (1874) L. R. 9 Q. B. 122.

(k) *Wilson v. Brett* (1843) 11 M. & W. 113.

(l) "Common carrier" denotes a person other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately: Carriers Act III of 1865, s. 2.

(m) Carriers of passengers are not liable as insurers so as to render them liable under all circumstances for not carrying the passengers safely. Their duty is to exercise reasonable care and diligence, and they cannot, therefore, be held responsible except for neglect of that duty: *East Indian Railway Co. v. Kalidas* (1901) 28 Cal. 401, L. R. 28 I.A. 144.

(n) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) 18 Cal. 620, 625, L. R. 18 I. A. 121.

(o) Secs. 6 and 8.

where it was held, that the duties and liabilities of a common carrier in India are governed by the principles of the English Common Law in conjunction with the provisions of the Carriers Act, and that, notwithstanding some general expressions in the chapter on Bailments, the responsibility of a common carrier is not within the Contract Act (p).

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Carriers by railways.—The liability of carriers by railway is now governed by the Railways Act IX of 1890. Sec. 72 of that Act provides that the responsibility of a railway administration for injury to goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under secs. 151, 152 and 161 of the Contract Act (q), and that it shall not be affected by the Common Law of England or the Carriers Act, but that it may be limited by a special agreement between the parties provided that it is in writing by or on behalf of the person sending the goods and is otherwise in a form approved by the Governor-General in Council.

Innkeeper.—It has been held by the High Court of Allahabad that the liability of a *guest* in respect of goods *belonging to a hotel-keeper* and used by the guest is that of a bailee under secs. 151 and 152 of this Act, so that the guest is not responsible for the loss, destruction, or deterioration of the furniture in his use if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own (r). It was held by the Bombay High Court, in a case which arose six years before the date of the Contract Act, that the liability of a *hotel-keeper* in respect of goods *belonging to a guest* was governed by the Common Law of England (s). To us it appears that the liability of an innkeeper should now be governed by the provisions of secs. 151 and 152. The case of an innkeeper is different from that of a common carrier: there is nothing to show that the Common Law rule as to the liability of an innkeeper has been recognised throughout India, as is the case with common carriers. This opinion is now supported by a decision of the Allahabad High Court (t).

Burden of proof.—In cases governed by the provisions of secs. 151 and 152, the loss of or damage to goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of disproving negligence lies on the bailee.

As regards bailments for hire, the rule has thus been stated by Strachey, C.J.: "If the damage caused were such that in the ordinary course of

(p) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) 18 Cal. 620, L. R. 18 I. A. 121.

(q) *The Secretary of State v. Bhagwan Das* (1927) 49 All. 889, 102 I. C. 440, (27) A. A. 371.

(r) *Rampal Singh v. Murray & Co.* (1899) 22 All. 164.

(s) *Whateley v. Palanji* (1866) 3 B. H. C. O. C. 137, 146.

(t) *Jan and Son v. Cameron* (1922) 44 All. 735.

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events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence; otherwise I think the owner must give some evidence of negligence" (u). Thus where a person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own (v). Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part (w).

Contract by bailee exempting himself from liability for negligence.—A bailee's liability cannot be reduced by contract below the limit prescribed by this section; a contract by a bailee purporting to exempt him wholly from liability for negligence is not valid (x).

Bailee's liability for negligence of servants.—A bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed; but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented, nor to unauthorized acts of his servants outside the scope of their employment (y).

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not liable
for loss, etc., of thing
bailed.

Care to be taken by bailee.—Since the standard of diligence required of a bailee is that of the average prudent man, a bailee of goods is not liable for loss of the goods by theft in his shop, if it is shown that he took as much care of the articles bailed as an ordinary prudent man would, under similar circumstances, take of his own goods of the same quality and value. For the same reason if A sends jewels to B for repairs, asking B to return them after repair as a value-payable parcel, and B does so, B is not liable for the loss of the jewels merely because he failed to insure the parcel. Failure

(u) *Rampal Singh v. Murray & Co.*
(1899) 22 All. 164, 167.

(v) *Shields v. Wilkinson* (1887) 9 All.
398, 406. See Evidence Act,
s. 106.

(w) *Trustees of the Harbour Madras v.*
Best & Co. (1899) 22 Mad. 524.

(x) *Sheikh Mahamed v. The British India*
Steam Navigation Co., Ltd. (1908)
32 Mad. 95, at p.120; *Bombay Steam*
Navigation Co. v. Vasudav Baburao
(1928) 52 Bom. 37, 29 Bom. L. R.
1551, 106 I. C. 470, (1928) A. B. 5.

(y) *Sanderson v. Collins* [1904] 1 K.B.
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to insure the jewels is not evidence of want of such care as a man of ordinary prudence would, under similar circumstances, take of his own goods, specially when the owner himself does not insure them when sending them out for repair (z). But it is negligence on the part of a carrier of goods to send jute in a boat with twenty or thirty leaks on its side, one or one and a half inches in length, and keep the goods in the hold of the boat for thirty hours (a).

The bailee's duty does not necessarily come to an end when the goods are lost or stolen. In England a bailee for reward ought to take such steps, if any, as are reasonable and usual with a view to recovering the goods. If he fails to do so, the burden of proof is on him to show that reasonable efforts would not have been successful (b).

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustrations.

A lets to B for hire a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

It is well settled law that a wrongful use or disposal of the goods by the bailee determines the bailment and remits the bailor to the rights and remedies of a person entitled to possession; a wrongful act means, for this purpose, a dealing wholly inconsistent with the terms of the bailment. Merely irregular exercise of a right, such as a sub-pledge to a third person by a pledgee, or a premature sale by a pledgee with power of sale, has not the same effect (c).

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee making unauthorized use of goods bailed.

Illustrations.

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

- (z) *Boseck & Co. v. Maudleston* (1906) Punj. Rec. no. 70.
(a) *Lakshmi Narain v. The Secretary of State for India* (1923) 27 C.W.N.

1017.
(b) *Coldman v. Hill* [1919] 1 K. B. 443.
(c) *Holliday v. Holgate* (1868) Ex. Ch. L. R. 3 Ex. 299, 302.

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(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

Illustration (b) is apparently suggested by the case put in old English books of a man borrowing a horse to ride to York and riding to Carlisle. See 1 C.B. 681.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture,
with bailor's consent,
of his goods with
bailee's.

This and the two following sections are clear enough.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture,
without bailor's consent,
when the goods can
be separated.

Illustration.

A bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark. *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

The proposition is almost too obvious to need stating. Not only this, but any other difficulty caused by unauthorized acts of the bailee which may attend the return of the bailor's goods according to the contract must be at the bailee's risk and expense.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture,
without bailor's consent,
when the goods cannot
be separated.

Illustrations.

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

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159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the face of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. He can have an action for damages against the bailee, and he has also further equitable rights. "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds and can follow the proceeds wherever they can be distinguished either being actually kept separate, or being mixed up with other moneys" (d).

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Unexplained failure to return the thing bailed is presumed to be by the bailee's default (e).

(d) Jassel, M.R., *Re Hallett's Estate* (1879) 13 Ch. Div. 696, 710.

(e) *Kush Kanta Burkakati v. Chandra Kanta Kakati* (1923) 28 C. W. N. 1041.

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✓ Conversely, if a bailor or consignee omits or refuses to take his goods at the proper time from a carrier (or, it would seem, any other kind of bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody (f).



Termination of
gratuitous bailment by
death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

The executors of persons who have borrowed things, especially books, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to
increase or profit from
goods bailed.

Illustrations.

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*.

Good sense and therefore good law, seemingly without any previous reported authority. New shares allotted in respect of shares that have been pledged are an increase claimable by the pledgor (g).

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Bailor's responsibility
to bailee.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several
joint owners.

(f) *G. N. R. Co. v. Swaffield* (1874)

L. R. 9 Ex. 132.

(g) *Motilal Hirabhai v. Bai Mani*

(1924) 52 I. A. 137; 49 Bom. 233,

27 Bom. L. R. 455, 86 I. C. 368,

('25) A. P. C. 86.

The section is permissive; it says "may", not "must" (h). Even if there is an agreement to the contrary, one of several joint owners cannot, after having accepted redelivery from the bailee, sue him jointly with the other owners; for "one party to a contract cannot maintain an action for a breach occasioned by his own act, and neither can three parties maintain an action unless each party separately could" (i).

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166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Bailee not responsible on redelivery to bailor without title.

Return of goods to or to the order of the bailor.—A bailee who in good faith returns the goods bailed to the bailor or his order is not liable to the true owner of the goods. *N* entrusted certain bales of cotton to *L*, a muccadam (warehouseman). *L* pledged the cotton with *B* (with whom he had dealings for several years) to secure advances made by *B* to *L*. Subsequently *L* redeemed the pledge, and the cotton was returned by *B* to or to the order of *L*. *N* sued *B* and *L* claiming delivery of the goods or their value. The Judicial Committee held that whether the pledge by *L* to *B* was or was not valid under sec. 178, the return of the goods by *B* in good faith to *L* was a complete defence to the suit against *B* (j).

✓ **Estoppel of bailee.**—Cf. the Evidence Act I of 1872, sec. 117.—The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is estopped from setting up the title of a third person against the bailor, unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming (k).

167. If a person, other than a bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of third person claiming goods bailed.

The bailee's protection against conflicting claims appears to be left to the general directions of the Code of Civil Procedure. In England the bailee can take refuge with the Court by interpleading (l).

(h) *May v. Harvey* (1811) 13 East, 197.

(i) *Brandon v. Scott* (1857) 7 E. & B. 334.

(j) *Bank of Bombay v. Nandlal Thackerseydass* (1912) L. R. 40 I. A. 1, 37 Bom. 122.

(k) *Biddle v. Bond* (1865) 6 B. & S. 225, approved by C. A. in *Rogers, Sons & Co. v. Lambert & Co.* [1891] 1 Q. B. 318, 325.

(l) *Rogers, Sons & Co. v. Lambert & Co.* [1891] 1 Q. B. 318, 327.

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168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

By the Common Law a person who finds lost goods and holds them with the intention of saving them for the true owner is certainly not a trespasser, and has no higher duties than a bailee but, the service being rendered without request from the owner, he does not seem entitled to any remuneration unless a specific reward has been offered for the return of the goods, and the offer has come to his knowledge; and if he cannot claim compensation there is no ground on which he can retain the goods.

The rule of the present section appears to be intended to satisfy natural justice. Presumably the compensation, if no specific reward has been offered and the parties cannot agree, is to be what the Court considers reasonable. If the parties do agree, the owner's promise of reward may be binding under sec. 25, sub-sec. 2.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

At Common Law sale by the finder would be a conversion.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Bailee's particular
lien.

Illustrations.

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(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give *A* three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

Principle of bailee's lien.—This section expresses the "Common Law principle that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid." (m).

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges" (n).

Further, where a person does work on goods delivered to him under an entire contract, the fact that the deliveries are at different times does not affect his right to a lien on all goods dealt with under that contract (o). Accordingly, where jute was delivered to a pressing company from time to time to be baled, but all under one contract, the lien was held to attach to all such goods (p).

✓ A bailee for reward cannot transfer his lien to a sub-contractor without the bailor's authority (q).

✓ *Contract to the contrary.*—Where there is an express contract to do certain work for a specified sum of money, there is no room for a *quantum meruit* claim. A person, therefore, to whom an organ is delivered for repairs for a certain sum is not entitled to retain it as security for a sum of money claimed not under the contract, but for work done (r).

171. Bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them;

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

- (m) Best, C.J., in *Bevan v. Waters* (1828) 3 Car. & P. 520. See *Judah v. Emperor* (1925) 53 Cal. 174, 90 I. C. 289, ('26) A. C. 464.
(n) Parke, B., in *Searfe v. Morgan* (1838) 4 M. & W. 270, 283.
(o) *Chase v. Westmore* (1816) 15 M. & S.

180.

- (p) *Miller v. Nasmyth's Patent Press Co., Ltd.* (1882) 8 Cal. 312.
(q) *Pennington v. Reliance Motor Works* [1923] 1 K. B. 127.
(r) *Skinner v. Jager* (1883) 6 All. 1394.

S. 171 but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General as distinct from particular lien: Bankers.—This “general lien,” as it is called by way of distinction from the “particular lien” of an artificer for work done by him on the particular goods in question (s), was originally established in England, as regards bankers and others, as a proved usage of trade; but, once being so established, it became part of the law merchant, and as much to be judicially noticed as any other part of the law (t). The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for a special purpose (u), and this on the ground that the limited and special purpose must be deemed to imply a contract to the contrary. Nor does the right extend to a trust account not the property of the customer (v). Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm (w). Nor does the lien of a banker extend to title deeds casually left at the bank after a refusal by him to advance money on them (x).

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circumstances, the agreement must be clearly inconsistent with the existence of such a lien (y). Accordingly, a deposit of valuables with a banker to secure debts and advance to a customer is subject to the banker’s lien for the customer’s general balance of accounts, unless the customer can prove an agreement to give up his general lien (z).

✓ A banker’s lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, ✓ and all securities deposited with him, in his character as a banker (a). In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title (b). But

(s) “A general lien is the right to retain the property of another for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained”: Kent, Comm. ii. 634.

(t) *Brandao v. Barnett* (1864) 12 Cl. & F. 787.

(u) See *Cuthbert v. Roberts, Lubbock & Co.* [1909] 2 Ch. 226, C. A.

(v) *Ex parte Kingston and Gross* (1871) 6 Ch. App. 632; *Lloyds Bank*

Ltd. v. Administrator General of Burma (1934) 12 Rang. 25, 151 I. C. 1018 ('34) A. R. 66.

(w) *Wolstenholm v. Sheffield Bank* (1886) 54 L. T. 746.

(x) *Lucas v. Dorrein* (1817) 7 Taunt 278.

(y) *Agra Bank's Claim* (1872) L. R. 8 H. L. 41.

(z) *Official Assignee of Madras v. Ramaswami Chetti* (1920) 43 Mad. 747.

(a) *Misa v. Currie* (1876) 1 App. Cas. 554; *London Chartered Bank v. White* (1879) 4 App. Cas. 413.

(b) *Bank of New South Wales v. Goulburn Butter Factory* [1902] A. C. 543.

there is no lien for advances made after notice of a defect in the customer's title (c), or after notice of an assignment of the moneys or securities in the banker's hands (d). S. 171

Ans ✓ **Factor.**—A factor “is an agent entrusted with the possession of goods for the purpose of sale” (e). He may buy and sell either in his own name or in that of the principal, though “he usually sells in his own name, without disclosing that of his principal.” The factor is said to have a “special property” in the goods consigned to him (f). Private instructions to sell only in the principal's name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien (g). But a banian in Calcutta is not a factor and has no lien for a general balance of account in the absence of an express contract to that effect (h). Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell *invito domino*. To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment (i).

Conformably to the principle governing all general liens, a factor's lien, where it exists, applies only to debts due to the factor in that character; it does not extend to “debts which arise prior to the time at which his character of factor commences” (j). But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for losses or liabilities incurred in the course of his employment in respect of which he is entitled to be indemnified (k).

✓ In order that the lien may attach, the goods must come into the possession, actual or constructive (l), of the factor. If, for instance, a factor accepts bills on the faith of a consignment of goods which, by reason of the bankruptcy of the principal, are never received by him, he has no lien on the goods as against the principal's trustee in bankruptcy (m). Nor does the lien extend to goods acquired otherwise than in his character of a factor (n), or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien (o). ✓

(c) *Locke v. Prescott* (1863) 32 Beav. 261.

(d) *Jeffreys v. Agra Bank* (1866) L. R. 2 Eq. 674.

(e) Cotton, L.J., in *Stevens v. Biller* (1883) 25 Ch. Div. 31, 37; *Emperor v. Parakh* (1925) 1 Luck. 133, 92 I. C. 744, (26) A. D. 202.

(f) *Baring v. Cowie* (1818) 2 B. & All. 137, 143, 148.

(g) *Stevens v. Biller* (1883) 25 Ch. Div. 31, 37.

(h) *Peacock v. Baijnath* (1891) 18 Cal. 573; L. R. 18 I. A. 78.

(i) *Jafferbhoy v. Charlesworth* (1893) 17 Bom. 520, 542.

(j) *Houghton v. Mathews* (1803) 3 B. & P. 585, 488.

(k) *Hammonds v. Barclay* (1802) 2 East. 227.

(l) *Bryans v. Nix* (1839) 5 M. & W. 775.

(m) *Kinloch v. Craig* (1790) 3 T. R. 119, 783.

(n) *Dixon v. Stansfeld* (1850) 10 C. B. 398.

(o) *Spalding v. Ruding* (1843) 6 Beav. 376.

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✓ **Wharfingers.**—(The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods.) He has no lien as against a buyer for charges becoming due from the seller after he has had notice of the sale (p); and where it was agreed between a buyer and seller, before the goods sold came to the hands of the wharfinger, that the contract of sale should be rescinded, it was held that the latter had no lien as against the seller for a general balance due to him from the buyer (q).

✓ **Attorneys.**—In England a solicitor has a lien on his client's documents (not only deeds and law papers) (r) entrusted to him as solicitor (s) "for all taxable costs, charges, and expenses incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fee" (t). A solicitor has also a lien for his costs on any fund or sum of money recovered for his client. (A solicitor in India has the same lien (v). As long as the Court has control of the funds, the lien is not liable to be defeated by a third party such as an assignee of a decree or an attaching creditor, even though the third party has no express notice of the lien (v).

✓ A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs. If, however, a solicitor discharges himself, he is not, according to English law, entitled to a lien, and the same law applies in India (w). Sec. 1 saves usages and customs of trade not inconsistent with the provisions of this Act, and the usage of trade of attorneys sanctioned by English law is not inconsistent with this section. Applying this reasoning, it was held by the Calcutta High Court that a dissolution of a firm of solicitors operates as a discharge of the client who employs them, and the attorneys are not entitled to retain the papers until their costs are paid (x).

The kinds of lien dealt with in this Act are as follows:—

- (1) Lien of finder of goods (s. 168 above);
- (2) Particular lien of bailees (s. 170 above);
- (3) General lien of bankers, factors, wharfingers, High Court attorneys and policy-brokers (s. 171 above);
- (4) Lien of pawnees (ss. 173, 174 below); and
- (5) Lien of agents (s. 221 below).

(p) <i>Barry v. Longmore</i> (1840) 12 A. & E. 639.	(1925) 49 Bom. 505, 27 Bom. L.R. 556, 88 I. C. 81, ('25) A.B. 351;
(q) <i>Richardson v. Goss</i> (1802) 3 B. & P. 119.	<i>Tyabhai Dayabhai & Co. v. Jetha Devji & Co.</i> (1927) 51 Bom. 855, 29 Bom. L.R. 1196, 105 I.C. 383, ('27) A.B. 542; <i>Ghulam Moideen v. Mahomed Omer</i> (1931) 60 Mad. L. J. 133, 131 I.C. 158, ('31) A.M. 183.
(r) <i>E.g., cheques: General Share Trust Co. v. Chapman</i> (1876) 1 C. P. D. 771.	(w) <i>Atool Chandra Mukerjee v. Shoshee Bhusan</i> (1904) 6 C. W. N. 215.
(s) <i>Sheffield v. Eden</i> (1878) 10 Ch. Div. 291.	(x) <i>Re McCorkindale</i> (1880) 6 Cal. 1, following <i>Re Moss</i> (1866) L. R. 2 Eq. 345.
(t) <i>Re Taylor Stileman and Underwood</i> [1891] 1 Ch. 590, 596.	
(u) <i>Deekabai v. Jefferson, Bhaishankar and Dinsha</i> (1886) 10 Bom. 248.	
(v) <i>Ved and Sopher v. R. P. Wagle & Co.</i>	

Some further comments with regard to liens, general and particular, of agents and sub-agents, and to the modes in which such liens may be extinguished or lost, will be found in the commentary on sec. 221 below.

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Bailment of Pledges.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the "pawnee."

"Pledge," "pawnor," and "pawnee" defined.

The section affirms the Common Law. The bailee under a contract of pledge does not become owner, but, as having possession and right to possess. he is said to have a special property (y). Any kind of goods, documents or valuable things of a personal nature may be pledged (z). Delivery is necessary to complete a pledge; it may be actual or constructive, and it is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made (a). Government promissory notes may be pledged, but this must be done as required by statute by endorsement and delivery (b). The rules of delivery and the like which are generally applicable to bailments are applicable here.

It is clear from the definition of "bailment" (s. 148 above) that there can be no pledge of goods unless there is an actual delivery of the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity; nor can it be said to be prohibited by the Contract Act because the Act contains provisions for bailments of pledges and none for hypothecation of goods (c).

log in security.

On goods deposited a banker has a general lien under sec. 171 as security for a general balance of account. This general lien is a mere right of retainer. But if goods are deposited with a bank to secure drafts drawn on the bank for the price of the goods, the transaction is a pledge and the bank has a right of sale under sec. 176 (d).

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses

Pawnee's right of retainer.

(y) See per Bowen, L. J., *Ex parte Hubbard* (1886) 17 Q. B. Div. at p. 698.

(z) 10 Enc. Laws of England, 2nd ed., 642, citing Story.

(a) *Hilton v. Tucker* (1888) 39 Ch. D. 669; *Jyoti Prakash v. Mukti Prakash* (1917) 22 C. W. N. 297.

(b) *Jyoti Prakash v. Mukti Prakash* (1917) 22 C.W.N. 297. See also *Neekram v. Bank of Bengal* (1891) 19 Cal. 322, L. R. 19 I.A. 60.

(c) *Haripada v. Anath Nath De* (1918) 22 C.W.N. 758.

(d) *Alliance Bank of Simla v. Ghamandi Lal Jaini Lal* (1927) 8 Lah. 373, 101 I.C. 725, (27) A.L. 408.

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incurred by him in respect of the possession or for the preservation of the goods pledged.

The pawnee makes himself a wrongdoer if he persists in holding the goods after tender of all that is due. In that event his "special property" is determined by his wrongful refusal of a tender properly made, and the pawnor can recover the goods (e).

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

This section does not appear to need any comment, except that the presumption mentioned at the end does not apply to advances made on a new and different security (f).

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right as to extraordinary expenses incurred.

"Receive."—Note that the word is not "retain," as in the two preceding sections, but "receive." A pawnee has, therefore, no right of lien for "extraordinary" expenses, as he has in the case of "necessary" expenses (s. 173), but has only a right of action in respect of them.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

Pawnee's right where pawnor makes default.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

(e) *Bank of New South Wales v. O'Connor* (1880) 14 App. Cal. 273, 282.

(f) *Cowasji v. Official Assignee* (1928) 30 Bom. L.R. 1310, 115 I.C. 389, ('28) A.B. 507.

Pawnee's rights.—The substance of this section is familiar and well settled English law.

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Where no time is originally stipulated for payment, it seems that the debtor is not in default until notice is given by the creditor that he requires payment on a certain day, and that day is past. The debtor is then in default, and is in the same position as if a day for repayment had been fixed in the original contract.^o

It must be observed that the contract of pledge differs essentially from that of mortgage. A mortgagee does acquire general property in the thing mortgaged, subject to the mortgagor's right to redeem. Foreclosure is a judicial determination of a defaulting mortgagor's right, whereby the mortgagee's property becomes absolute. A pawnee, not being the legal owner, is not entitled to foreclose, but has only power to sell (g); and authorities on mortgage transactions are to be applied to cases of pledge, if at all, only with great caution.

"May sell the thing pledged."—The power conferred on the pledgee under this section to sell the property without reference to the Court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him (h). There is nothing in the Act to forbid the pawnee from buying the thing pledged at the sale, though he cannot sell to himself. But it has been held by the Judicial Committee that a sale by the pawnee to himself, though unauthorized, does not put an end to the contract of pledge so as to entitle the pawnor to have back the thing pledged without payment of the debt secured by it (i).

Reasonable notice of sale.—It is not necessary that the notice under this section should state the date, time or place of the intended sale. A notice by the pledgee to the pawnor that unless the latter redeems the articles pledged within a fortnight, the pledgee will sell them is good notice, though the pledgee may not sell the goods until some days after the expiration of the fortnight (j). In this case the Allahabad High Court held that notice of an intention to sell is sufficient. But the Calcutta High Court has held that a notice to pay "failing which we shall arrange for the sale of the hypothecated property" is not a compliance with the section (k). The Madras High Court has held that if notice is given of the sale the pawnee is

(g) *Carter v. Wake* (1877) 4 Ch. D. 605.

(h) *Mahalinga v. Ganapathi* (1902) 27 Mad. 528; *Nim Chaud v. Jogabundhu* (1894) 22 Cal. 21; *Jyoti Prakash v. Mukti Prakash* (1917) 22 C.W.N. 297.

(i) *Neckram v. Bank of Bengal* (1891) 19 Cal. 322, 333; L.R. 19 I.A. 60.

(j) *Kunj Behari Lal v. Bhargava Commercial Bank* (1918) 40 All. 522, 45 I.C. 462; *Kesarimal v. Gundarathula Juryanarayanamurty* 114 I. C. 820, ('28) A. M. 1022.

(k) *Hindusthan Bank v. Surendra Nath* (1932) 59 Cal. 667, 138 I.C. 852, ('32) A. C. 524.

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not obliged to sell within a reasonable time of the expiry of the period prescribed in the notice (l).

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

This is supplemental to the foregoing section, and requires no further explanation.

Limitation.—The period for a suit against a pawnee to recover the thing pledged is thirty years from the date of the pawn. See Limitation Act, Sch. I, art. 145.

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this section the expressions “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

This section is the counterpart of the second paragraph of sec. 27 of the Indian Sale of Goods Act, 1930, which relates to sales.

The present sec. 178 and sec. 178A were inserted by the Indian Contract (Amendment) Act, 1930, which came into force on the 1st July, 1930.

Pledge by mercantile agent.—By sec. 2 of the Indian Sale of Goods Act, sub-sec. (9), “mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods. This definition has been taken from the English Factors Act, 1889, sec. 1.

(l) *Kesarimal v. Gundarathula Jyura-narayanamurty* (1928) 114 I. C.

820, ('28) A. M. 1022.

The old section 178 was as follows: "A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly. S. 178

Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud."

The language of the old sec. 178 was very wide and it appeared capable of giving effect to pledges made by persons who were in temporary possession of goods or documents of title without having either the real or apparent authority of mercantile agents, and indeed without being agents of any kind. The Courts endeavoured to keep the results within intolerable bounds by putting a strict construction on the word "possession," but this was only a partial remedy.

The old section allowed an owner of goods though not in physical possession of the goods to obtain a loan on the security of a pledge of the goods by a pledge of the documents of title, as decided by the Privy Council in *Official Assignee of Madras v. Mercantile Bank (m)*. Under the English law an owner cannot do this unless constructive delivery has been completed by the person in physical possession attorning to the pledgee. In 1930 the Indian Legislature brought the section into conformity with the English law and the privilege of pledging goods by pledging documents of title was restricted to mercantile agents as in the Factors Acts. This establishes, as the Privy Council in the case last cited observed, the curious and anomalous position that the mercantile agent can do what the owner cannot do, i.e., make a pledge of goods by a pledge of the documents of title without the attornment of the warehousemen or other custodian.

Other cases in which a person other than the owner of the goods may make a valid pledge are dealt with in sec. 178A below and in sec. 30 of the Indian Sale of Goods Act considered below. The result is that a valid pledge can now only be made by a mercantile agent as provided in sec. 178, or by a person who has obtained possession of the goods under a contract voidable under sec. 19 or sec. 19A of the Act as provided in sec. 178A, or by a seller or by a buyer in possession of goods after sale as provided in sec. 30 of the Indian Sale of Goods Act.

The changes caused by the amendment of the section may be illustrated by the following examples:—

(1) A commission agent or broker may make a valid pledge of the goods under the old as well as the present section.

(m) (1934) 61 I.A. 416, 427, 68 M.L.J. 26, 37 Bom. L.R. 130, 152 I.C. 730, (34) A.P.C. 246.

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(2) A seller left in possession of goods may make a valid pledge under the old section as well as under sec. 30 of the Indian Sale of Goods Act.

(3) A person in bare custody of goods may not make a valid pledge either under the old or the present section.

(4) A hirer under a hire-purchase agreement who has entered into a binding agreement to buy goods may make a valid pledge under the old as well as the present section. See notes below, "Seller or buyer in possession after sale."

(5) A person entrusted with goods for a specific purpose may not make a valid pledge either under the old or the present section.

(6) Under the old law, both the owner and the mercantile agent could create a pledge by delivering documents of title. Under the new law only a mercantile agent can create a pledge of documents of title. The owner must deliver the goods in order to create a pledge.

Antecedent debt.—The present section seems to protect a pledge for an antecedent debt as well as a pledge for an advance made specifically upon it. See English Factors Act, 1889, sec. 4.

Good faith.—To validate a pledge by a mercantile agent the pledgee must have acted in good faith and must not have at the time of the pledge notice that the pawnor had no authority to pledge the goods. The onus of proving both these facts rests upon the person disputing the validity of the pledge. Under sec. 3, cl. 20, of the General Clauses Act, 1897, a thing is to be deemed done in good faith where it is in fact done honestly whether it is done negligently or not. Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequence (n).

Notice.—The term "notice" in this section includes both express and constructive notice.

Seller or buyer in possession after sale.—Besides the cases mentioned above there are two other cases in which a person who is not the owner of goods may make a valid pledge thereof, namely, a seller left in possession after sale, and a buyer to whom possession has been delivered before payment of the price. These cases have been provided for in sec. 30 of the Indian Sale of Goods Act, 1930, which is a reproduction of sec. 25 of the English Sale of Goods Act. 1893.

That section provides not only for a sale by a buyer or seller in possession, but also for a pledge, mortgage or other disposition of goods.

(n) See *Jones v. Gordon* (1877) 2 App. Cas. 616, at p. 629. Cases under the Indian Factors Act, 1842 : *Gobind Chunder Sein v. Rayan*

(1861) 9 M. I. A. 140 ; 1 W. R. 43, P. C. ; *Jonmenjoy v. Watson* (1884) 10 Cal. 901 ; L. R. 11 I. A. 94.

Pledge by seller remaining in possession.—The following is an illustration of a pledge by a seller left in possession of the goods sold :—

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A sells 100 cases of cutlery to *B* under an agreement made in July, 1927, that payment should be made within five months from the date of the agreement and delivery should be taken within that time, the goods remaining in the meanwhile in *A*'s godown free of rent. In August, 1927, *A* pledges the goods with *C* who has no notice of the sale to *B*. The pledge to *C* is valid (*o*).

Pledge by buyer obtaining possession.—Sec. 30 (2) of the Indian Sale of Goods Act validates a pledge not only by a person who has bought goods but also by one who has agreed to buy them. The hirer under a hire-purchase agreement is not a person who has agreed to buy goods within the meaning of this section unless he is under a binding agreement to buy them. An option to buy will not suffice (*p*).

Competition between prior mortgagee and subsequent pledgee.—*A* mortgages certain goods to *B*, the mortgage not being accompanied with possession (*q*). Afterwards *A* pledges the goods with *C*, who has not notice of the mortgage. The pledge to *C* is not invalid, and *C* has a priority over *B* (*r*).

Documents of title to goods.—As to what this term means see sec. 2, sub-sec. (4), of the Indian Sale of Goods Act, 1930, below. Share certificates are not documents of title to goods within the meaning of that section (*s*), nor cash receipts given in place of delivery orders (*t*).

Revocation of authority of mercantile agent.—A pledge by a mercantile agent, though made after the revocation of his authority, is valid, provided the pledgee has not at the time of the pledge notice of such revocation (*u*).

178A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a

Pledge by person in possession under voidable contract.

- (o) *Haji Rahimbux v. Central Bank of India, Ltd.* (1928) 56 Cal. 367, 119 I.C. 23, ('29) A.C. 447; a case under the old s. 178.
- (p) *Belsize Motor Supply Co. v. Cox* (1914) 1 K. B. 244.
- (q) A mortgage of movable property, although not accompanied by possession, is valid in India; *Shrish Chandra Roy v. Mungri Bewa* (1904) 9 C. W. N. 14; *Damodar v. Atmaram* (1906) 8 Bom. L. R. 344.

- (r) *Chummun Khan v. Mody* (1874) Punj. Rec. no. 70; *Abdul Habib v. Maung Tur Kyaing* (1931) 9 Rang. 182, 131 I.C. 723, ('31) A. R. 201.
- (s) *Lalit Mohan v. Haridas* (1916) 24 Cal. L. J. 335.
- (t) *Kemp v. Falk* (1882) 7 App. Cas. 573, at p. 585.
- (u) See English Factors Act, 1889, s. 2 (2), and *Moody v. Pallmall* (1917) 33 Times L. R. 306.

S. 178A good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

This section is the counterpart of sec. 29 of the Indian Sale of Goods Act, 1930. That section is based on sec. 23 of the English Sale of Goods Act, 1893.

Pledge by person in possession under voidable contract.—A person may obtain possession of goods under a contract which is voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion (s. 19), or on the ground of undue influence (s. 19A). Possession so obtained is not by free consent as defined in sec. 14 of the Act. It is nevertheless possession by consent, and the person in possession may make a valid pledge of the goods, provided the contract has not been rescinded at the time of the pledge. There is in such a case a *de facto* contract, though voidable on the ground of fraud and the like. It is, however, different if there is no real consent, as where goods have been obtained by means of theft as defined in sec. 378 of the Indian Penal Code. A thief has no title and can give none.

Where goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none. Thus if *A* represents to *B* that he is acting as agent for *C*, and *B* relying on that representation delivers goods to *A* as buyer, there is not a voidable contract between *A* and *B*, but no contract at all. No property passes to *A*, and he can neither make a valid sale (*v*) nor a valid pledge. This is really a case of a fundamental error as to the person with whom one is contracting. There is no real consent and no contract; there is only an offer on *B*'s part to the person with whom alone he means to deal and thinks he is dealing: See note under sec. 13 above, "Error as to the person of the other party." But if a person buys goods with the intention of not paying for them, there is consent, though not free, and a contract, though voidable (*w*), and he may make a valid pledge or sale of the goods while the contract is still subsisting (*x*), though the fraud may amount to the offence of cheating, as defined in sec. 415 of the Indian Penal Code.

Pledge by co-owner in possession.—One of several joint owners of goods in sole possession thereof with the consent of the rest may make a valid pledge of the goods (*y*). Compare Indian Sale of Goods Act, sec. 28.

Good faith.—See note under sec. 178.

Notice.—See note under sec. 178.

(*v*) *Hardman v. Booth* (1863) 32 L. J. Ex. 105.

(*w*) *Clough v. Lond. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 26.

(*x*) *Croft v. Lumley* (1858) 6 H. L. C. 672, 705.

(*y*) *Shadi Ram v. Mahtab Chand* (1895) Punj. Rec. No. 1.

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

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This must be taken as subject to the operation of the foregoing section. In those cases where a pledge which otherwise would not be valid is made valid by secs. 178 and 178A, it does not matter whether the pawnor has any interest of his own or not. The present section applies to other cases where the pawnor has possession and some interest, but not the whole interest, in the goods; and where it applies, it is immaterial that the pawnee had no notice of the pawnor's limited interest (z). The true scope of the section has been thus defined by Scott, C.J., "Section 179 does not limit the scope of [the old] section 178, but saves a pledge to the extent of the pledgee's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to [the old] sec. 178. In other words, whenever he has an interest, the person in possession of the goods or documents has unconditional authority to charge at least that interest" (a).

Suits by Bailees or Bailors against Wrong-doers.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Suit by bailor or bailee against wrong-doer.

The section is hardly likely to present any difficulty in practice.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Apportionment of relief or compensation obtained by such suits.

In other words, it does not matter which of them recovers first, or whether one sues or both. Of course the defendant cannot be liable in all for more than the value of the goods, and special damages, if any.

(z) *Hoare v. Parker* (1788) 2 T.R. 376.
(a) *Lakhamsey Ladha & Co. v. Lakmi-chand* (1918) 42 Bom. 205, doubted in *Haji Rahim Bux v. Central*

Bank of India, Ltd. (1928) 56 Cal. 367, 387-388, 119 I.C. 23, (29) A.C. 497.

CHAPTER X.

Agency.

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[In the commentary on this chapter "Story on Agency" is referred to as S.A.]

Appointment and Authority of Agents.

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

Nature of agency in general.—The law stated in the introductory group of sections (182—189) under this heading] is too elementary to need much exposition. [The essential point about an agent's position is his power of making the principal answerable to third persons. A person does not become an agent on behalf of another merely because he gives him advice in matters of business (b).]

Agency sometimes has to be distinguished from facts more or less resembling it.

The legal relation between a merchant in one country and a commission agent in another is that of principal and agent, and not seller and buyer (c). A merchant, therefore, in this country, who orders out goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods (d).

An agent may have, and often has, in fact, a large discretion, but he is bound in law to follow the principal's instructions provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant; and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract of hiring and service.

Del credere agent.—A *del credere* agent is one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties (e). A *del credere* agency may be inferred

(b) *Mohesh Chandra Bosu v. Radha Kishore Bhattacharjee* (1908) 12 C. W. N. 28, 32.

(c) *Ireland v. Livingstone* (1872) L.R. 5 H. L. 395.

(d) *Mahomedally v. Schiller* (1889) 13 Bom. 470.

(e) *Thomas Gabriel & Sons v. Churchill and Sim* [1914] 3 K.B. 1272, C.A.

from a course of dealing between the principal and agent showing that extra remuneration was charged for the risk of bad debts (*f*). A *del credere* agent incurs only a secondary liability towards the principal; he is in effect a surety for the person with whom he deals to the extent of any default by insolvency or something equivalent, but not to the extent of a refusal to pay based on a substantial dispute as to the amount due.

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Co-agents.—Two or more persons may be employed to act as agents jointly or severally, or jointly and severally. In the absence of circumstances indicating an intention to the contrary, an authority given to two or more persons is presumed to be given to them jointly and not severally, and in such case it is necessary that they should all concur in the execution of the authority in order to bind the principal (*g*).

Co-principals.—When an agent is appointed by more than one principal, he is liable to them jointly. He is not bound to account separately to any one of them and if he does so, he is not thereby absolved from his liability to others (*h*).

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

As between the principal and third persons, the act of an agent is looked upon as the act of the principal who authorized it. Hence the rule that a person who has no capacity, or only a limited capacity, to contract on his own behalf is competent to contract so as to bind his principal (*i*). On this principle it has been held that notice to a father can be served on his minor son as his agent (*j*).

185. No consideration is necessary to create an agency.

By the Common Law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be

(*f*) *Shaw v. Woodcock* (1827) 7 B. & C. 73.

(*g*) *Brown v. Andrew* (1849) 18 L. J. Q. B. 153; *In re Liverpool Household Stores* (1890) 59 L.J. Ch. 616.

(*h*) *Ragbhar Dayal v. Firm Piare Lal* ('33) A.L. 93, 145 I.C. 178.

(*i*) *Foreman v. Great Western Ry. Co.* (1878) 38 L.T. 851.

(*j*) *In re De Souza* (1932) 54 All. 548, 138 I. C. 70, ('32) A.A. 374.

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defined by the terms of a contract, is in its nature independent of contract ; but a merely gratuitous employment or authority does not bind the agent to do anything.

Agent's authority
may be expressed or
implied.

186. The authority of an agent may be expressed or implied.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case ; and thing spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Definitions of express
and implied authority.

Illustration.

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

✓ Implied authority.—The ordinary course of affairs must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. “A person who employs a broker must be supposed to give him authority to act as other brokers do” (*k*).

A power of attorney authorizing the holder “to dispose of” certain property in any way he thinks fit does not imply an authority to mortgage the property (*l*). Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes (*m*). Authority on dissolution of partnership to settle the partnership affairs does not authorize the drawing, accepting, or indorsing of bills of exchange in the name of the firm (*n*). Where the principal carries on a general money-lending business, the authority to the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others for the benefit of the principal's customers (*o*).

Husband and wife.—This is a special and important case of implied authority. “The liability of a husband for a wife's debt depends on the

(*k*) *Sutton v. Tatham* (1839) 10 Ad. & E. 27.

(*l*) *Malutchand v. Sham Moghan* (1890) 14 Bom. 590 and *Bank of Bengal v. Fagan* (1849) 5 M.I.A. 27, 41.

(*m*) *Pestonji v. Gool Mahomed* (1874) 7 M.H.C. 369.

(*n*) *Abel v. Sutton* (1800) 3 Esp. 108.

(*o*) *Bank of Bengal v. Ramanathan* (1916) L. R. 43 I.A. 48, 54, 43 Cal. 527, 540.

principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done" (p). "Thus a person dealing with a wife and seeking to charge her husband must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed (q), or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law could give her an implied authority to bind him for necessaries supplied to her during such separation in the event of his not providing her with maintenance" (r). Where a European husband and wife, therefore, lived together, it was held that the husband was not liable for moneys borrowed by the wife to pay her previous debts, and not for the purpose of any household or necessary expenses (s). Similarly, a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding school and was in receipt of payments made by the parents of children boarding with her (t). Much the same principles apply to Hindus. A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation (u). There can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead. In such a case the lender must be taken to have dealt with the woman in her own right, "and not looking in any way to the husband as responsible for the debt" (v).

It is now settled in England that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances" (w), such as the presumption from a man and his wife living together in the ordinary way "that he entrust her with such authorities as are commonly and ordinarily given by husband and wife" (x), including authority to pledge his credit to a reasonable extent and in a reasonable manner for ordinary household expenses. Where such authority exists, it can be revoked; or its existence may be

(p) *Girdhari Lal v. Crawford* (1885) 9 All. 147, 155.

(q) Not conclusively: *Debenham v. Mellon* (1880) 6 App. Cal. 24.

(r) *Viraswami v. Appaswami* (1863) 1 M.H.C. 375.

(s) *Girdhari Lal v. Crawford* (1885) 9 All. 147, 155.

(t) *Mahomed Sultan Sahib v. Horace*

Robinson (1907) 30 Mad. 543.

(u) *Nathubhai v. Jawher* (1876) 1 Bom. 121, 122.

(v) *Pusi v. Mahadeo Prasad* (1880) 3 All. 122.

(w) *Debenham v. Mellon* 6 App. Ca. 24, at p. 31 (Lord Selborne).

(x) *Ib.* : 6 App. Ca. 24, at p. 36 (Lord Blackburn).

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negated by the husband supplying the wife with an adequate allowance of ready money (y).

Extent of agent's authority.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations.

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen for the purposes of carrying on the business. [It has been held, but contrary to English authority, that an agent having general authority to carry on the principal's business and receive and expend money therein has implied authority to borrow money so far as necessary for carrying on the business (z)].

✓ **Extent of authority.**—It is well settled that an agent's authority is in Story's words (s. 58), "construed to include all the necessary and usual means of executing it." If its terms are ambiguous, the principal will be held bound by that sense, in which the agent reasonably understood and acted upon them (a). Further, an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates (b), partly because this may be presumed to have been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have.

The following are illustrations from the English authorities of the rule stated in the first paragraph of the section. An agent employed to get a bill discounted has authority to warrant it a good bill, but not to indorse it in the principal's name (c). If employed to find a purchaser for property, he has authority to describe the property, and state any circumstances which may affect its value, to a proposed purchaser (d). Authority to sell a horse implies authority to warrant its soundness if the principal is a horse-dealer (e),

- (y) *Morel Brothers & Co. v. Earl of Westmoreland* [1903] 1 K.B. 64 C.A.
(z) *Dhanpat Rae v. Allahabad Bank* (1926) 2 Luck. 253, 98 I.C. 783, ('27) A.O. 44.
(a) *Ireland v. Livingstone* (1872) L.R. 5 H.L. 395.
(b) *E.g., Pole v. Leask* (1860) 28 Beav.

562.
(c) *Fenn v. Harrison* (1791) 3 T.R. 757, 4 T.R. 177.
(d) *Mullens v. Miller* (1882) 22 Ch. D. 194.
(e) *Howard v. Sheward* (1866) L.R. 2 C.P. 148.

or if the sale is at a fair or public market (*f*), but not if the principal is unaccustomed to dealing in horses and the sale is a private one (*g*). S. 183

Where an agent is authorized to receive payment of money on his principal's behalf, the payment, in order to bind the principal, must be in cash (*h*), unless it can be shown that, by a reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form ;, as, for instance, by cheque (*i*) or bill of exchange (*j*).

Authority to do every lawful thing necessary for the purpose.—The authority conferred by this section to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency. Thus where *A* appointed *B* manager of his silk factory, and executed to him a power of attorney specifying his powers and authority but the document gave no authority to *B* to borrow, it was held that *A* was not liable for money borrowed by *B* as manager and attorney of *A* (*k*).

Authority of counsel, attorney, and pleader.—Though the relation between a client and an attorney or pleader is that of principal and agent, it is not so in the case of counsel (*l*). Nevertheless counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, without need of further authority, full power to compromise a case on behalf of his client (*m*). But this authority does not extend to a compromise of matters outside the scope of the particular case in which he is retained or matters collateral to it (*n*), nor to referring the case itself to arbitration on terms different from those which the client has authorized (*o*). According to the Calcutta High Court, the general authority of counsel (whether barrister or advocate) extends in India only to compromises in Court (*p*). The whole subject has recently been reviewed by the Judicial Committee without mention of this distinction (*q*). An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skilful, and *bona fide* manner, provided that his client has given

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| (<i>f</i>) <i>Brooks v. Hassall</i> (1883) 49 L.T. 569. | (1890) 13 All. 272; <i>Nundo Lal v. Nistarini</i> (1900) 27 Cal. 428. |
| (<i>g</i>) <i>Brady v. Todd</i> (1861) 9 C.B.N.S. 592. | |
| (<i>h</i>) <i>Pape v. Westacott</i> [1894] 1 Q.B. 272; <i>Blumberg v. Life Interests, etc., Corporation</i> [1898] 1 Ch. 27. | (<i>n</i>) <i>Johurmull Bhutra v. Kedar Nath Bhutra</i> (1928) 55 Cal. 113, 104 L.C. 387, (27) A.C. 714; <i>Sheonandan v. Abdul Fatesh</i> (1935) 62 I. A. 196, 14 Pat. 545, 37 Bom. L.R. 845, 156 I. C. 694, (35) A. P.C. 119. |
| (<i>i</i>) <i>Bridges v. Garret</i> (1870) L. R. 5 C.P. 451. | (<i>o</i>) <i>Neale v. Gordon Lennox</i> [1902] A.C. 465; <i>Chuni Lal Mandal v. Hira Lal Mandal</i> (1928) 32 C.W.N. 44, 106 I. C. 309, (28) A. C. 378. |
| (<i>j</i>) <i>Williams v. Evans</i> (1866) L. R. 1 Q. B. 352 (auctioneer has no authority to take bill of exchange in payment of deposit). | (<i>p</i>) <i>Askaran Choutmal v. E. I. R. Co.</i> (1925) 52 Cal. 386, 88 I. C. 413, (25) A. C. 696. |
| (<i>k</i>) <i>Ferguson v. Um Chand Boid</i> (1905) 33 Cal. 343. | (<i>q</i>) <i>Sourendra Nath Mitra v. Tarubala Dasi</i> (1930) 57 I.A. 133, 57 Cal. 1311, 123 I.C. 545, (30) A.P.C. 158. |
| (<i>l</i>) Per Lord Esher, M.R., in <i>Matthews v. Munster</i> (1887) 20 Q.B. Div. 141, 142. | |
| (<i>m</i>) <i>Bowen, L.J.</i> , 20 Q.B. Div. at p. 144; <i>Jang Bahadur v. Shankar Rai</i> | |

S. 188 him no express directions to the contrary (r). In the only Indian case on the subject, the Court found that the client had authorized his attorney to compromise, and that the compromise was reasonable and proper (s). The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority (t).

Authority of factor.—A factor to whom goods are entrusted for sale has authority to sell them in his own name on reasonable credit at such times and at such prices as in his discretion he thinks best, to receive payment of the price where he sells them in his own name, and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods. But he has no implied authority to barter the goods nor to delegate his authority, even if acting under a *del credere* commission.

Authority of broker.—A broker authorized to sell goods has implied authority to sell on reasonable credit; to receive payment of the price if he does not disclose his principal; and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable (u). A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract of agency is regarded as unreasonable (v). He has no implied authority to cancel, or vary contracts made by him; nor to receive payment of the price of goods sold on behalf of a disclosed principal; nor, even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale. A broker has no implied power to delegate his authority even if acting under a *del credere* commission.

Authority of auctioneer.—An auctioneer has implied authority to sign a contract on behalf of both buyer and seller, an authority which does not, however, extend to his clerk (w). The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction. An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him (x); but he may take a cheque in payment of the deposit according to the usual custom (y). Authority to sell by auction does not imply any authority to sell by private

(r) *Prestwich v. Poley* (1865) 18 C.B.N. S. 806.

(s) *Jagannathdas v. Ramdas* (1870) 7 B.H.C.O.C. 79.

(t) *Jagapati v. Ekambara* (1897) 21 Mad. 274.

(u) *Robinson v. Mollett* (1874) L.R. 7

H.L. 802.

(v) *Robinson v. Mollett* (1874) L.R. 7 H.L. 802.

(w) *Bell v. Balls* [1897] 1 Ch. 663.

(x) *Williams v. Evans* (1866) L.R. 1 Q.B. 352.

(y) *Farrer v. Lacy* (1885) 31 Ch. Div. 42.

contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve (z). S. 188

Authority of shipmaster.—The authorities indicating the extent of the implied authority of master of British ships are very numerous. For present purposes it seems sufficient to cite only some of the more important cases. (a) Being appointed to conduct the voyage on which the ship is engaged to a favourable termination, a shipmaster has implied authority to do all things necessary for the due and proper prosecution of the voyage (a). He may also borrow money on the credit of his principals, if the advance is necessary for the prosecution of the voyage, communication with the principals is impracticable and they have no solvent agent on the spot. (b)

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable (b). The cargo alone may be hypothecated (by a contract called *respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible (c). (c)

In the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue the voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur, the master has implied authority to sell the ship. Where repairs are absolutely necessary in order to prosecute the voyage, and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage. But his authority as agent of the owners of the cargo is strictly one of necessity, and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination. (d)

A shipmaster has implied authority to enter into contracts for the carriage of merchandise according to the usual employment of the ship, and to enter into a charter-party on behalf of the owners if he is in a foreign port, and there is difficulty in communicating with them. His authority to sign bills of lading is limited to signing for goods actually received on board (d), and he has no authority to sign at a lower freight than the owners contracted for, or making the freight payable to any other persons than the owners. (e)

Limitation
to authority

(z) *Marsh v. Jelf* (1862) 3 F. & F. 234.

(a) *Beldon v. Campbell* (1851) 6 Ex. 886.

(b) *Kleinwort v. Cassa Marittima Genoa* (1877) 2 App. Cas. 156.

(c) *The Onward* (1873) L.R. 4 Ad. 38.

(d) *Cox v. Bruce* (1886) 18 Q.B. Div.

147. The master's signature is *prima facie* evidence against the owners that the goods signed for were put on board, but it is not conclusive against them: *Smith v. Bedouin Steam Navigation Co.* [1896] A.C. 70.

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189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Illustration (b) seems to be suggested by Story's opinion that, "if goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be sold": S. A. sec. 193. Under this head comes the authority by which the master of a ship may sell the goods of an absent owner in case of necessity when he is unable to communicate with the owner and obtain his directions (e). But the manager of a business which does not include borrowing money as part of its ordinary course has no implied authority to borrow money on his principal's credit to carry on the business, even if the money is urgently needed (f).

Sub-Agents.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

When agent cannot delegate.

One who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another. The reason that no such power can be implied as an ordinary incident in the contract of agency is that confidence in the particular person employed is at the root of the contract. Accordingly, auctioneers, factors, directors of companies, brokers, and other agents in whom confidence is reposed have, generally speaking, no power to delegate their authority. "But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed." And "an authority to the effect referred to may and should be implied where, from

(e) *Australasian Steam Navigation Co. v. Morse* (1872) L.R. 4 P.C. 222. | (f) *Hawtayne v. Bourne* (1841) 7 M. & W. 595, 600.

the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may be reasonably presumed that the parties to the contract originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute" (g). Authority to delegate is implied whenever the act to be done by the sub-agent is purely ministerial, and does not involve the exercise of any discretion (h).

In some cases the custom of trade justifies the delegation of special branches of work. Thus it has been found to be a usage of trade for architects and builders to have the quantities taken out from their designs by surveyors, who are more expert in that work, for the purpose of enabling a proper estimate to be made; and the surveyor can sue the architect's employer for his charges (i).

"Sub-agent"
defined.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

The relation of the sub-agent to the original agent is, as between themselves, that of agent to principal. "It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals." : S. A. sec. 386. In the three next following sections the Act has defined, in accordance with settled law, the relations of the ultimate principal to the sub-agent in different cases.

Representation of
principal by sub-agent
properly appointed.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility
for sub-agent.

The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

(g) *De Bussche v. Alt* (1878) 8 Ch. Div. 286, 310, 311.

(h) *Ex parte Birmingham Banking Co.*

(1868) L.R. 3 Ch. 461.

(i) *Moon v. Witney Union* (1837) 3 Bing. N.C. 814.

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Principal and sub-agent.—Where authority to appoint a sub-agent in the nature of a substitute for the first agent “exists” either by agreement or as implied in the nature of the business “and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself” (j). This is the class of cases contemplated in sec. 194. Otherwise the sub-agent looks to and is controlled by the agent who appointed him, and is not under any contract with the principal. If money due to *A* is paid to *P*, who is *Z*'s servant, *Z* having authority from *A* to collect it, *P* is accountable only to *Z*, and *A* cannot recover the money direct from *P* (k).

A sub-agent who does not know that his employer is an agent is entitled to the same rights as any other contracting party dealing with an undisclosed principal (see ss. 231, 232 below).

Agent's responsibility for sub-agent.—A commission agent for the sale of goods, who properly employs a sub-agent for selling his principal's goods, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment.) The last clause of this section, giving a principal in case of fraud or wilful wrong the right of recourse to the sub-agent, does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent (l).

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

If the sub-agent purports to act in the name of the ultimate principal, that principal may adopt his acts by ratification, as he might adopt acts purporting to be done on his behalf by any other person (ss. 196—200 below). But it is conceived that, if a sub-agent acts in his own name or in that of the agent who has taken on himself without authority to delegate to him business which is in fact the principal's, the acts so done cannot be ratified by the principal.

(j) *De Bussche v. Alt* (1878) 8 Ch. Div. 286, 311.

(k) *Stephens v. Badcock* (1832) 3 B. &

Ad. 354.

(l) *Nensukhdas v. Birdichand* (1917) 19 Bom. L.R. 948.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

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Relation between principal and person duly appointed by agent to act in business of agency.

Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorises *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C & Co.* *B* instructs *D*, a solicitor, to take legal proceedings against *C & Co.* for the recovery of the money. *D* is not a sub-agent but is solicitor for *A*.

In such cases as are put in the illustrations *B*, as between *A* and the auctioneer or solicitor, is treated as merely the messenger of *A*'s direct authority. This section apparently means to draw a clearly marked line between an ordinary sub-agent and a person who is put in relation with the principal, a "substitute" as he is called in the passage already quoted above (*m*). Apparently this section covers the case of an upper servant in a household who has authority to select and dismiss under-servants. Such a servant, at any rate, is not answerable to third persons for acts or defaults of those under him which he has not specifically authorised.

The following section and this section, read together, show that they do not apply to the case of an agent being instructed to hand over all or part of the business to a certain named person and no other; in such case he is not answerable for the capacity or conduct of that person; his duty is done when he has established relation between the substituted agent and the principal, and then secs. 191, 192 have no place (*n*).

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty on naming such person.

(m) *De Bussche v. Alh*, 8 Ch. Div. 310, 311 (1878).

(n) *T. C. Chowdury & Bros. v. Girindra*

Mohan Neogi (1929) 56 Cal. 686, 121 I. C. 636, (30) A. C. 10.

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Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Right of person as
to acts done for him
without his authority.
Effect of ratification.

Conditions of ratification : "On behalf of another."—Ratification must be by the person for whom the agent professes to act. "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority" (o). But "where *A* does an act as agent for *B* without any communication with *C*, *C* cannot, by afterwards adopting that act, make *A* his agent and thereby incur any liability or take any benefit, under the act of *A*" (p). "Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognized in sec. 196 of the Indian Contract Act" (q).

A man cannot adopt by ratification an act which was not authorized by him at the time and did not purport to be done on behalf of any principal (r).

- (o) *Wilson v. Tumman* (1843) 6 Man. & Gr. 236, 243 ; 64 R.R. 770, 776, per Cur.
(p) *Ib.*, head-note.
(q) *Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu* (1908) 12 C.W.

- N. 393, 408 ; L.R. 35 I.A. 48, 58.
(r) *Keighley, Maxted & Co. v. Durant* [1901] A.C. 240 ; *Raghavachari v. Pakkiri Mahomed* (1916) 360 Mad. L.J. 497, 501.

Since a ratification is in law equivalent to a previous authority, a person not competent to authorize an act cannot give it validity by ratifying it (s).

“Ratification must be by an existing person on whose behalf the contract might have been made at the time” (t). Thus a newly-formed company cannot ratify an act done in its name before it was incorporated (u). And where a time is limited for doing an act, and *A* does it on behalf of *B*, but without his authority, within that time, *B* can ratify it only before the time has expired (v).

“Acts done without knowledge or authority.”—An act done by an agent in excess of his authority may also be ratified (w). But the ratification of an act done without authority does not confer authority to do similar acts in future (x).

Retrospective effect.—Ratification, if effective at all, relates back to the date of the act ratified. The rule goes so far that if *A* makes an offer to *B* which *Z* accepts in *B*'s name without authority, and *B* afterwards ratifies the acceptance, an attempted revocation of the offer by *A* in the time between *Z*'s acceptance and *B*'s ratification is inoperative (y).

A owes money to *B*, and *Z* pays *B* on behalf of *A* but without authority from *A*. If *B* knowing that *Z* has no authority accepts payment, he is estopped from pleading *Z*'s want of authority and claiming payment again from *A*. If *B* on discovering *Z*'s want of authority returns the money to *Z*, there is nothing that *A* can ratify and *A* cannot rely on the payment as a discharge of his debt to *B* (z).

What act cannot be ratified.—A transaction which is void *ab initio* cannot be ratified (a). This is illustrated in England by a line of cases in company law marking the distinction between irregularities capable of being made good if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's object as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law.

(s) *Irvine v. Union Bank of Australia* (1877) 3 Cal. 280, 285; L.R. 4 I. A. 86; 2 App. Ca. 366.

(t) *Kelner v. Baxler* (1886) L.R. 2 C.P. 174, 185.

(u) *In re Empress Engineering Co.* (1880) 16 Ch. Div. 125; *Ganesh Flour Mills Co. v. Puran Mal* (1905) Punj. Rec. no. 2.

(v) *Dibbins v. Dibbins* [1896] 2 Ch. 348.

(w) *Secretary of State v. Kamachee Boyce* (1859) 7 M.I.A. 476.

(x) *Irvine v. Union Bank of Australia* (1877) 3 Cal. 280, 287; L.R. 4 I.A. 86; 2 App. Ca. 366, 375.

(y) *Bolton Partners v. Lambert* (1889) 41 Ch. Div. 295.

(z) *Walter v. James* (1871) L.R. 6 Ex. 124.

(a) *Mauji Ram v. Tara Singh* (1881) 3 All. 852.

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Agents of Government.—Acts done by public servants in the name of the Crown, or the Government of India, may be ratified by subsequent approval in much the same way as private transactions (see *Secretary of State v. Kamachee Boyee (b)* and *Collector of Masulipatam v. Cavalry Vencata (c)*).

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations.

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

Express ratification.—An express ratification cannot become complete until it is communicated; till then it is liable to revocation (d).

Implied ratification.—Assent to an act done on one's behalf, like consent to an agreement may be conveyed otherwise than in words; and taking the benefit of the transaction is the strongest, as it is the most usual evidence of tacit adoption. Accepting the results of the agent's proceeding, whether obviously beneficial to the principal or not, will have the same effect.

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

The Judicial Committee have laid down in general terms that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (e). Again the Court of Appeal in England has said: "To constitute a binding adoption of acts *a priori* unauthorized these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were" (f).

(b) (1859) 7 M.L.A. 476.

(c) (1860) 8 M.L.A. 529, 554.

(d) *Rajagopalacharyulu v. The Secretary of State for India* (1915) 38 Mad. 997, 1008.

(e) *La Banque Jacques Cartier v. La Banque d'Epargne, etc.* (1887) 13 App. Ca. 111.

(f) *Marsh v. Joseph* (1897) 1 Ch. 213, 246.

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

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It is obvious that a man cannot at his own choice ratify part of a transaction and repudiate the rest (g).

200. An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of unauthorized act cannot injure third person.

Illustrations.

(a) *A*, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

This is the converse of the principle that a voidable transaction cannot be rescinded to the prejudice of third person's rights acquired under it in good faith. Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself (h). The ratification of a contract does not give the principal a right to sue for a breach committed before the ratification (i). *A* holds a lease from two joint receivers, *B* and *C*, *B*, without *C*'s authority, gives notice to quit to *A*. The notice cannot be ratified by *C* so as to be binding on *A* (j).

Revocation of Authority.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed;

Termination of agency.

(g) See *Keay v. Fenwick* (1876) 1 C.P.D. 745, 753.

(h) *Bird v. Brown* (1850) 4 Ex. 786, 80 R. 775.

(i) *Kidderminster v. Hardwick* (1873) L.R. 9 Ex. 13.

(j) *Cassim Ahmed v. Esuf Haji Ajam* (1916) 23 Cal. L.J. 453.

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or by either the principal or agent dying or becoming of unsound mind ; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

This is English law. The present section has made the law clear in India. We have to read it with the following ones to sec. 210 inclusive, which modify its effect in various ways.

Completion of business of agency.—The Allahabad and Calcutta High Courts hold that where an agent for the sale of goods receives the price, the agency does not terminate on the sale of the goods, but continues until payment of the price to the principal (*k*). In a Madras case, Wallis, C.J., expressed the opinion that the agency terminates when the sale is completed, and that it does not continue until payment of the price (*l*). The authority of an agent for sale to contract on the principal's behalf ceases as soon as the sale is completed. He has no power to alter the terms of the contract without fresh authority from the principal (*m*).

The authority of an agent to collect bills and to remit the amount, when realized, by drafts, terminates as soon as the drafts are despatched (*n*).

Death of principal.—A power of attorney to an agent to present a document for registration is revoked by the death of the principal. It was accordingly held by the Judicial Committee that where the principal died before the presentation, and the registrar, knowing of the principal's death, accepted and registered the document, the registration was invalid (*o*). See notes to sec. 209 below.

Where the agency is for a fixed term.—"Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not ; consequently where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended " (*p*).

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency where agent has an interest in subject-matter.

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| <p>(<i>k</i>) <i>Babu Ram v. Ram Dayal</i> (1890) 12 All. 541, followed in <i>Fink v. Buldeo Dass</i> (1899) 26 Cal. 715, 724, 725.</p> <p>(<i>l</i>) <i>Venkatachalam v. Narayanan</i> (1916) 39 Mad. 376, 378-379.</p> <p>(<i>m</i>) <i>Blackburn v. Scholes</i> (1810) 2 Camp. 343.</p> | <p>(<i>n</i>) <i>Alliance Bank of Simla, Ltd. v. Amritsar Bank</i> (1915) Punj. Rec. no. 79, p. 322.</p> <p>(<i>o</i>) <i>Mujid-un-Nissa v. Abdur Rahim</i> (1900) 23 All. 233, L.R. 28 I.A. 15.</p> <p>(<i>p</i>) <i>Per Mookerjee, J., in Lalljee v. Dadabhai</i> (1916) 23 Cal. L.J. 190, 202.</p> |
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Illustrations.

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(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself, out of the price, the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death.

Authority coupled with interest.—In these cases the current phrase is that the agent's authority is "coupled with an interest." The principle is thus stated: "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable" (q). In fact, the circumstances must be such that revocation of the authority would be a breach of faith against the agent. Illustration (b) is a variation of the facts of an English case (r) where, however, the authority was held to be revocable as it was not given as security for the advances. In the English case the advances were made after the authority had been given, and so the agent's interest arose afterwards and was incidental. In the illustration the advances are made first and then the authority is given for the purpose of being a security.

The interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom do not constitute such an interest as would prevent the termination of the agency (s). Upon the same principle, where an agent is appointed to collect rents, and his salary is agreed to be paid out of those rents, it does not give the agent an interest in the subject-matter of the agency within the meaning of this section (t). But where an agent is authorized to recover a sum of money due by a third party to the principal and to pay himself, out of the amount so recovered, the debts due to him from the principal, the agent has an interest in the subject-matter of the agency, and the authority cannot be revoked (u).

Factors for sale of goods.—The question has often arisen as to whether a factor who has made advances as against goods consigned to him

(q) *Smart v. Sandars* (1848) 5 C.B. at p. 917; *Carmichael's Case* [1896] 2 Ch. 643, 648; *Chathu Kutti v. Kundan* (1931) 61 M.L.J. 852, 136 L.C. 776, ('32) A.M. 70.

(r) *Smart v. Sandars* (1848) 5 C. B. 895, 918. And see *Frith v. Frith* [1906] A.C. 254.

(s) *Lakmichand v. Chotooram* (1900)

24 Bom. 403; *Dalchand v. Seth Hazarimal* ('32) A.N. 34.

(t) *Vishnucharya v. Ramchandra* (1881) 5 Bom. 253.

(u) *Pestaji v. Matchett* (1870) 7 B.H. C.A.C. 10. See also *Subrahmanya v. Narayanan* (1901) 24 Mad. 130, and *Jagabhai v. Rustamji* (1885) 9 Bom. 311.

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for sale has such an interest in the goods consigned as to prevent the termination of his authority to sell. The result of the cases appears to be that the authority of a factor to sell is in its nature revocable, and the mere fact that advances have been made by him, whether at the time of his employment as such or subsequently, cannot have the effect of altering the revocable nature of the authority to sell, unless there is an agreement express or implied between the parties that the authority shall not be revoked (*v*). Where the factor is expressly authorized to repay himself the advances out of the sale proceeds, as in illustration (*b*), he has an interest in the goods consigned to him for sale, and the authority to sell cannot be revoked. In such a case "an interest in the property" is expressly created. But the "interest" need not be so created, and it is enough to prevent the termination of the agency that the "interest" could be inferred from the language of the document and from the course of dealings between the parties. Thus where a factor who had made advances as against goods consigned to him for sale was authorized to sell them "at the best price obtainable," and in the event of a shortfall to draw on the consignor, it was held that this arrangement gave an interest to the factor in the goods, and that the authority to sell could not be revoked (*w*).

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may
revoke agent's authority.

What amounts to exercise of authority.—An agent authorized to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him "so as to bind the principal" if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with the third party, and the principal, therefore, may revoke the authority (*x*).

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser (*y*), and authority given to a policy broker to effect a policy at any time before the policy is executed so as to be legally binding. Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid, even if it has been credited in account.

(*v*) *Jafferbhoy v. Charlesworth* (1893)
17 Bom. 520, 542.

(*w*) *Kondayya v. Narasimhulu* (1893)
20 Mad. 97.

(*x*) *Lakmichand v. Chotooram* (1900)
24 Bom. 403.

(*y*) *In re Hare & O'More's Contract*
[1901] 1 Ch. 93.

- 204.** The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.
- Revocation authority has partly exercised. where been Ss. 204, 205

Illustrations.

(a) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A* and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payment for the cotton.

(b) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name, and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

Authority partly exercised.—The rule here laid down is connected with the principal's duty to indemnify the agent (s. 222 below). "If a principal employs an agent to do something which by law involves the agent in a legal liability"—or even in a customary liability by reason of usage in that class of transactions known to both agent and principal—"the principal cannot draw back and leave the agent to bear the liability at his own expense" (z). If a principal revoke his agent's authority to carry on an enterprise, and the agent nevertheless carries it on and contrary to expectations makes a profit, the principal cannot then ignore his own revocation and claim the profit (a).

- 205.** Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.
- Compensation for revocation by principal or renunciation by agent.

Compensation for revocation.—By this section "the principal is bound to make compensation to the agent whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent" (b).

(z) *Read v. Anderson* (1884) 13 Q. B. Div. 779, 783.

(a) *Haridar Prasad Singh v. Kesho Prasad Singh*, (1925) 93 I.C. 454,

605, ('25) A.P. 68.

(b) Per Cur. in *Vishnucharya Ramchandra* (1881) 5 Bom. 253, 256.

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In the absence of an express or implied contract, the mere undertaking of the agency is not a sufficient ground for compensation. *A* employed *B* as his sole agent for the sale of *A*'s coal for seven years. *B* was not entitled to compensation when *A* closed his colliery and ceased to supply coal before the end of the term of seven years. The House of Lords held that in the absence of a special term in the contract that *A* should continue to supply coal during the term, there was no implied obligation on *A* to carry on business for the benefit of the agent (c).

There is a class of cases in which an agent for sale, having proceeded far enough in the transaction to be entitled to commission on its completion, has been deprived of his commission by the principal putting an end to the whole matter. But these cases do not depend on the rule here laid down, or on any rule peculiar to the law of agency. They are examples of the rule that one party to a contract must not prevent another from performing his part (ss. 53, 67 above), or "each party is entitled to the full benefit of his contract without hindrance from the other" (d). See further the commentary on sec. 219 below.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice of revocation or renunciation.

An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Revocation and renunciation may be expressed or implied.

Illustration.

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termination of agent's authority takes effect as to agent, and as to third persons.

(c) *Rhodes v. Forwood* (1876) 1 App. Ca. 256, per Lord Penzance at p. 272.

(d) *Prickett v. Budger* (1856) 1 C.B.N.S. 296.

*Illustrations.*Ss.
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(a) *A* directs *B* to sell goods for him, and agrees to give *B* 5 per cent. commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B*, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter, directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

Time from which revocation operates.—"Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before." [S. A. s. 470.]

Except as to illustration (c), which removes an anomaly, this section is in accordance with the common law. When *A* trades as *B*'s agent with *B*'s authority (even though the business be carried on in *A*'s name, if the agency is known in fact), all parties with whom *A* makes contracts in that business have a right to hold *B* liable to them until *B* gives notice to the world that *A*'s authority is revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account (e).

209. When an agency is terminated by the principal dying or becoming of unsound mind, the

Agent's duty on termination of agency by principal's death or insanity.

agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

An agency is terminated under sec. 201 by the death of the principal. If the agent thereafter continue in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms (f). See notes to sec. 208 above.

(e) *Trueman v. Loder* (1840) 11 A. & E. 589. | (f) *Madhusudan v. Rakhal Chandra* (1916) 43 Cal. 248, 254-255.

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210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agent's authority.

Agent's Duty to Principal.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in conducting principal's business.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

Additional Illustrations.

(i) An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed. [*Lilley v. Doubleday* (1881) 7 Q.B.D. 510.]

(ii) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value in the event of their being lost. [*Smith v. Lascelles* (1788) 2 T.R. 187.]

(iii) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade. He must make good the loss. [*Solomon v. Barker* (1862) 2 F. & F. 926, 121 R.R. 828.]

(iv) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured. [*Ferrers v. Robins* (1835) 2 C.M. & R. 152.]

Departure from instructions.—In *Bostock v. Jardine* (g) the defendants were authorized to buy a certain quantity of cotton for the plaintiff. "Instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people," so that there was no contract on which the plaintiff could sue as principal. Accordingly, "though a contract was made, it was not the contract the plaintiff authorized the defendants to make," and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase-money (h).

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It is not an agent's duty to obey instructions which are unlawful. If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest *bona-fide* bid, though it may be lower than that price (i).

"If any loss be sustained."—Where an agent in breach of his duty sells his principal's goods below the limit placed upon them by the principal, the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of price placed on the goods. Where no loss is suffered, the principal is entitled at least to nominal damages, as the sale is wrongful (j).

As to the duty to account for profits, see sec. 216 and commentary thereon.

Customs of trade.—According to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, net free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant (k).

Usage of the Bombay market known as the pakki adat system.—The following are the incidents of a contract entered into on *pakki adat* terms :—

(1) The *pakka adatia* has no authority to pledge the credit of the up-country constituent of the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant,

(g) (1865) 3 H. & C. 700.

(h) *Beaumont v. Boulbee* (1802) 7 Ves. 599, 608.

(i) *Bezwell v. Christie* (1776) Cowp. 395.

(j) *Manchubhai v. Tod* (1894) 20 Bom. 633; *Chelapathi v. Surayya* (1902)

12 M.L.J. 375; *Mathra Das-Mustaddi Lal v. Kishen Chand Ramji Das*, (1925) 7 Lah. L.J. 84, 86 I.C. 567, ('25) A.L. 332.

(k) *Paul Beier v. Chotalal Javerdas* (1906) 30 Bom. 1.

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either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

The relation between the *pakka adatia* and the up-country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins, C.J. :—

“ I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia*, in circumstances like the present, is one whereby he undertakes or, to use the word in its non-technical sense as business men on occasion do use it, guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid : in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

“ I do not say that there is no relation of principal and agent between the parties at any stage ; there may be up to a point, and that this is legally possible is shown by Mellish, L.J., in *Ex parte White* (l) where he speaks of ‘ a person who is an agent up to a certain point.’ So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score ” (m). In *Manilal Raghunath v. Radha Kison Ramjiwan* (n) Macleod, C.J., said the only distinction between a *pakka adatia* and a broker who is liable on his contract is that the former does not contract as agent, but as principal ; in other words, the *pakka adatia* undertakes business for his principal, but the particular contracts by which he carries out that business are his own affair.

Usage of the Bombay market known as the *kachhi adat* system in cotton business.—Under the *kachhi adat* system, when an *adatia* receives an order from an up-country constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled (o) becomes from that moment binding upon both the *adatia* and the broker,

(l) (1870-1871) L.R. 6 Ch. 397, at p. 403.

(m) *Bhagwandas Narotamdas v. Kanji Deoji* (1906) 30 Bom. 205, in app. from (1905) 7 Bom. L.R. 57 ; *Bhagwandas v. Burjorji* (1917) 45 I. A. 29, 32-33, 42 Bom. 377-378. See also *Kedarmal*

Bhuramal v. Surajmal Govindram (1907) 33 Bom. 364.

(n) (1921) 45 Bom. 386.

(o) The rates are settled in consequence of constant fluctuation in the market, which may rise or fall every two minutes.

and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two ways: he either procures a party willing to take up the contract and introduces him to the *adatia*, and the party and the *adatia* thus exchange *kabalas* (contracts) with each other; or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia* and the other party to his (broker's) contract, and these two then exchange *kabalas* with each other. If, when the party is brought to the *adatia*, the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such a usage (p).

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211, 212

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London, to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual inquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(p) *Fakirchand Lalchand v. Doolub Govindji* (1905) 7 Bom. L.R. 213.
As to the discretion to call for margin in the Bombay Cotton

Market, Devshi v. Bhikamchand (1926) 29 Bom. L.R. 147, 100 I.C. 993, ('27) A.B. 125.

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(c) *A*, an insurance broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B* his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Of. S.A. secs. 183—185, 191, 217, 220, 221 : “ When a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the art he undertakes An express promise or express representation in the particular case is not necessary. . . . The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and therefore misconduct.” And the employer is justified in dismissing an employee who shows himself incompetent, though he may have been engaged for a term not expired (*g*). How far an agent employed in the general supervision of work has to answer for the skill and diligence of workers under him must depend on the nature of the work and on local usage (*r*). An agent is bound to know so much of the law material to the business in hand as will enable him to protect the principal’s interest, and make the transaction binding on the other party (*s*). Every person acting as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties (*t*). But an agent who is definitely authorized to enter into a particular transaction is not liable to the principal for any loss which may be suffered in consequence of the imprudent nature of the transaction (*u*); nor is he liable for the consequence of a mere mistake or error of judgment provided he exercises such care and skill as may be reasonably expected under the circumstances (*v*). A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent (*w*).

(*g*) *Hatner v. Cornelius* (1858) 5 C.B. N.S. 6; 236, 116; w. 654, *Cur. per* Willes, J.

(*r*) *Nagendra Nath Singha v. Nagendra Bala Chowdhurani* (1926) 43 Cal. L.J. 479, 97 I.C. 200, (26) A.C. 988.

(*s*) *Neilson v. James* (1882) 9 Q.B. Div. 546.

(*t*) *Lee v. Walker* (1872) L.R. 7 C.P. 121.

(*u*) *Overend v. Gibb* (1872) L.R. 5 H.L. 480.

(*v*) *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392.

(*w*) *Agnew v. Indian Carrying Co.* (1865) 2 M.H.C. 449.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand. Ss. 213, 214

Agent's duty to account.—This duty is elementary, and will be enforced at need by following in the agent's hands property representing money for which he ought to have accounted (x). It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them with the vouchers by which the items of disbursement are supported (y). If an agent neglects to keep proper accounts, everything consistent with established facts will be presumed against him in the event of his being called upon for an account of the agency (z). "The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee" (a).

When a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, and advances have been applied for the benefit of the minor, the agent ought to be allowed these advances in taking the accounts. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself (b).

Where an agent enters into contract with a third person in his own name, and subsequently sues on the contract and obtains a decree, the principal is not entitled to maintain a suit for a declaration that he is beneficially interested in the decree and to recover the amount thereof from the judgment-debtor. The fact that the principal is entitled to an amount from the agent does not entitle him to maintain a suit of this kind. He could have adopted the contract and sued on it himself; after a decree is passed for the agent, he is too late (c).

See also the commentary on sec. 218 *post*.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Agent's duty to communicate with principal.

(x) *Chedworth v. Edwards* (1802) 8 Ves. 46.

(y) *Annoda Persad v. Dwarknath* (1881) 6 Cal. 754. See also *Ram Das v. Bhagwat Das* (1904) 1 All. L. J. 347; *Madhusudan v. Rakhal* (1916) 43 Cal. 248, 259-260.

(z) *Gray v. Haig* (1854) 20 Beav. 219.

(a) *Bhawani Singh v. Maulvi Misbah-ud-din* (1929) 56 I.A. 170, 10 Lah. 352, 31 Bonr. L. R. 762, 115 I. C. 729, (29) A. P.C. 119.

(b) *Surendra Nath Sarkar v. Atul Chandra Roy* (1907) 34 Cal. 892.

(c) *Dodhanram v. Jaharmull* (1913) 40 Cal. 335.

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215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transactions, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

Illustrations.

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A* on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy in ignorance of the existence of the mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Authoritative illustrations of the principle here laid down might be multiplied almost indefinitely from the English reports. The kind of case given in illustration (a) is the most common, but there is no doubt that the rule is general. "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt" (d).

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (e).

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal (f), or settle any claim against the principal on exorbitant

- (d) Lord Lyndhurst, *Charter v. Trevelyan* (1844) 11 Cl. & F. at p. 732; 65 R.R. at p. 315. In India it seems to be an ordinary question of fact, see *Rameshardas Benarashidas v. Tansookhray Bashesarlal*, 102 I. C. 366, ('27)

A. S. 195.

- (e) *Willies, J.*, in *Mollett v. Robinson* (1870) L.R. 5 C.P. at p. 655.
(f) *Grant v. Gold Exploration, etc., Syndicate of British Columbia* [1900] 1 Q.B. 233.

terms thereby to increase his own profit (g). An agent must give his principal "the free and unbiassed use of his own discretion and judgment" (h).

Ss.
215, 216

A principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on (i).

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

Illustration.

A, directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Additional Illustration.

A, acting as B's agent, agrees with C for the sale to him of fifty maunds of grain for future delivery. A delivers his own grain to C as against the contract. Subsequently he receives grain from B for delivery to C under the contract, which he sells in the market at a profit. B may, on discovering these facts, claim the profit from A. [*Domodar Das v. Sheoram Das* (1907) 29 All. 730.]

Principal's rights to profits.—"It may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers": S.A. sec. 211, adopted by the Court of Queen's Bench (j). It is immaterial that in acquiring the profit the agent may have run the risk of loss (k), and that the principal may have suffered no injury (l). Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can

(g) *Mathra Das Jayan Nath v. Jiwan Mal-Gian Chand* (1927) 9 Lah. 7.

(h) *Clarke v. Tipping* (1846) Beav. 284, 292.

(i) *Wentworth v. Lloyd* (1864) 10 H. L. Cas. 589.

(j) *Morison v. Thompson* (1874) L. R. 9 Q. B. 480, 485; *Official Assignee*

v. R.M.P.V.M. Firm (1929) 7 Rang. 61.

(k) *Williams v. Stevens* (1866) L. R. 1 P. C. 352.

(l) *Parker v. McKenna* (1874) L. R. 10 Ch. 96; *Kaluram Bholaram v. Chinniram Motilal* (1934) 36 Bom. L. R. 68.

S. 216

recover the sum of money received to his use. Such extra profit or commission is called a secret profit or bribe. The agent and the briber are jointly and severally liable for any loss actually sustained by the principal *e.g.*, a fraudulent addition to the price of the goods in order to provide the secret commission.

Forfeiture of commission.—An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction, even if the principal adopts it, for the principal could forthwith recover it back from him under this section or the equivalent common law rule. Moreover, he has no authority to make a contract with himself, and therefore has earned nothing as agent (*m*).

Knowledge of principal.—A transaction of this kind may be approved or ratified by the principal (*n*), but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do (*o*). Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price (*p*).

Profit not acquired in course of agency.—It was decided in an English case (*q*) that an agent who without disclosure sells to his principal property which he had purchased before the commencement of the agency is not liable for the profit he has made. The Bombay High Court has held that sec. 216 makes no such qualification on the liability of an agent. In such a case the agent is liable for the difference between the price at which he supplies the goods to the principal and the market value at that date (*r*).

Agreements against agent's duty void.—An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehla* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucra*, on the brokerage earned by them in respect

- (*m*) *Solomans v. Pender* (1865) 3 H. & C. 639; *Joachinson v. Meghjee Vallabhdas* (1909) 34 Bom. 292.
 (*n*) *Re Haslam* [1902] 1 Ch. 765.
 (*o*) *Gluckstein v. Barnes* [1900] A. C. 240.
 (*p*) *Damodhar Das v. Sheoram Das* (1907) 29 All. 730.

- (*q*) *In re Cape Breton Co.* (1885) 29 Ch. D. 795 C. A. doubted in *Re Olympia Ltd.* (1898) 2 Ch. 153 but followed in *Binland v. Earle* (1902) A. C. 83.
 (*r*) *Kaluram Bholaram v. Chinniram Motilal* (1934) 36 Bom. L. R. 68.

of transactions carried out through them by the *mehta's* master, and no express consideration was alleged or proved by the *mehta*, the Court refused to imply as a consideration an agreement by the *mehta* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the duty a servant owes his master (s).

Ss.
216-218

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retainer out of sums received on principal's account.

The right conferred in terms by this section is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. Sec. 221 below further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, i.e., a right to have his claims satisfied, in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand, so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The Court will not allow any collusive arrangement between parties to deprive the solicitor of this benefit (t).

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on account.

Mode of payment.—It follows from this rule that an agent to receive money has generally no authority to receive anything else as equivalent. As between the principal and a third person, a set-off or balance of account between that person and the agent in his own right is not a good payment to the agent on behalf of the principal. The debtor "must pay in such a manner as to facilitate the agent in transmitting the money to his principal" (u).

(s) *Vinayakrav v. Ransordas* (1870) 7 Bom. H. C. O. C. 90.

(t) *Ex parte Morrison* (1868) L. R. 4 Q. B. 153, 156. See *Cullianji*

Sangjibhoy v. Raghawji Vijpal (1906) 30 Bom. 27.

(u) *Pearson v. Scott* (1878) 9 Ch. D. 102, 108.

Ss.
218-219

Payments in respect of illegal transaction.—If an agent receive money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money (v). Upon this principle it has been held that an agent receiving moneys due to the principal under a wagering contract (w), is bound under the provisions of this section to pay the same to the principal. But this rule does not apply where the contract of agency is itself illegal (x).

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

When agent's remuneration becomes due.

"Special contract."—When there is an express contract providing for the remuneration of the agent, the amount of the remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of that contract (y). In the absence of an express contract, the right to remuneration and conditions under which it is payable are held in English law to depend on the custom or usage of the particular business in which the agent is employed (z). The same principle applies in India (a). The words "special contract" in this section include a contract arising by implication from custom or usage.

"Completion of such act."—"The question whether or not an agent is entitled to commission has repeatedly been litigated and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him" (b). In other words, the

(v) *Bhola Nath v. Mul Chand* (1903) 25 All. 639; *Palaniappa Chettiar v. Chockalingam Chettiar* (1921) 44 Mad. 334.

(w) *Bhola Nath v. Mul Chand*, *supra*.

(x) *Sykes v. Beadon* (1879) 11 Ch. D. 170.

(y) *Green v. Mules* (1861) 30 L.J.C.P. 343; (if it is agreed that commission shall be payable only in the event of success, the agent cannot claim a *quantum meruit* in the absence of success); *Cutler v.*

Powell (1795) 6 T. R. 320; *Clack v. Wood* (1882) 9 Q.B.D. 276; *Ayyannath Chetty v. Subramania Iyer* (1923) 45 Mad. L. J. 409 [brokerage payable if title approved].

(z) *Read v. Rann* (1830) 10 B. & C. 438
Baring v. Stanton (1876) 3 Ch. D. 502.

(a) *Selchidananda Dutt v. Nritya Nath Mitter* (1923) 50 Cal. 878.

(b) *Per Erle, C.J.*, in *Green v. Bartlett* (1863) 14 C.B.N.S. 681.

commission becomes due if the broker has induced in the party for whom he acts the contracting mind, the willingness to open negotiations upon a reasonable basis (c). A broker employed to procure a loan on property becomes entitled to his commission if he finds a party willing to advance the money, even "if the contract were afterwards to go off from the caprice of the lender, or from the infirmity of the title" (d). He must show that the contract was brought about as a direct result of his intervention, although he may not have been the first or only source of the principal's information (e). It is not sufficient to show that the transaction would not have been entered into but for his services, but he must go further and show that the transaction was the direct consequence of the agency (f).

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219, 220

Agent prevented from earning remuneration.—If in breach of a contract, express or implied, with an agent, the principal, by refusing to complete a transaction or otherwise, prevents the agent from earning remuneration, the agent is entitled to damages (g); and in such case the measure of damages, where the agent has done all that he undertook to do, is the full amount of remuneration that he would have earned if the transaction had been duly completed, or the principal had otherwise carried out his contract (h).

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted.

Illustrations.

(a) *A* employs *B* to recover 100,000 rupees from *C*, and to lay it out on good security. *B* recovers the 100,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 100,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B* [*sic* in the Act, but it should obviously be *A*].

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is not entitled to any remuneration for his services, and must make good the loss.

(c) *Municipal Corporation of Bombay v. Cuverji Hirji* (1895) 20 Bom. 124.

(d) *Fisher v. Drewitt* (1878-9) 48 L.J. Ex. 32; *Elias v. Govind* (1902) 30 Cal. 202.

(e) *Jordon v. Ram Chandra Gupta* (1904) 8 C.W.N. 831.

(f) *Gibson v. Crick* (1862) 1 H. & C. 142;

Tribe v. Taylor (1876) 1 C.P.D. 505.

(g) *Turner v. Goldsmith* [1891] 1 Q.B. 541; *Mehta v. Cassumbhai* (1922) 24 Bom. L.R. 847.

(h) *Prickett v. Badger* (1856) 1 C.B.N.S. 296; *Roberts v. Barnard* (1884) 1 C. & E. 336.

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"A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission." Accordingly where an agent for sale, having sold the property, retained half the deposit as commission with the principal's consent, and also, without the principal's knowledge, received a commission from the buyer, the agent was held liable not only to account for the secret commission to the principal, but to return the usual commission, which he had retained (v). But an agent who retains discounts received by him from third persons, in the honest belief that he is entitled to retain them, does not thereby forfeit his commission, although he may be liable to account for the discounts as profits received without the knowledge or consent of the principal (j).

221. In the absence of any contract to the contrary, an agent is entitled to retain (k) goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

✓ Agent's lien.—One practical consequence of this rule is that a buyer of property from an auctioneer, or other agent known to be in possession of the property and entitled to a lien on it, cannot set up payment to the principal as a defence to an action for the price at the suit of the agent (l). Similarly a subsequent charge given by the principal to a third person will be postponed to a factor's lien. An auctioneer, employed to sell furniture at the house of the owner, is sufficiently in possession of the furniture to entitle him to a lien thereon for his charges and commission (m). But a lien cannot be acquired by a wrongful act. Nor when property is entrusted to an agent for a special purpose, can the agent claim any lien, the existence of which is inconsistent with such purpose (n). In order that an agent may have a valid lien on property in his hands, the following conditions must be satisfied: (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien; (2) the property on which the right to lien is claimed should belong to the principal to the knowledge of the agent; (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent and (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party (o). See further on this subject the commentary on sec. 171.

(i) *Andrews v. Ramsey & Co.* [1903] 2 K.B. 635.

(j) *Hippisley v. Knee* [1905] 1 K.B.1.

(k) Not sell: *Mul Chand-shib Dhan v. Sheo Mal Sheo Parshad*, 123 I.C. 867, ('29) A.L. 666.

(l) *Robinson v. Rutter* (1885) 4 E. & B.

954.

(m) *Williams v. Millington* (1788) 1 H.Bl. 81; 2 R.R. 724.

(n) *Buchanan v. Findlay* (1829) 9 B. & C. 738.

(o) *Pestonji v. Ravji Javerchand* ('33) A. S. 235.

The lien claimable under this section is confined to commission, disbursements, and services in respect of the specific property on which lien is claimed.

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How far lien effective against third persons.—The lien, whether general or particular, of an agent attaches only on property in respect of which the principal has, as against third persons, the right to create a lien (*p*), and, except in the case of money and negotiable securities, is confined to the rights of the principal in the property at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time (*q*).

Lien of sub-agents.—A sub-agent who is employed by an agent, without the authority, express or implied, of the principal has no lien, either general or particular, as against the principal (*r*). But a sub-agent who is properly appointed has the same right of lien against the principal in respect of debts and claims arising in the course of the sub-agency, on property coming into his possession in the course of the sub-agency, as he would have had against the agent employing him if the agent had been the owner of the property; and this right is not liable to be defeated by a settlement between the principal and agent to which the sub-agent is not a party (*s*).

Lien how lost or extinguished.—The lien of an agent, being a mere right to retain possession of the property subject thereto, is, as a general rule, lost by his parting with the possession (*t*). But where possession is obtained from the agent by fraud, or is obtained unlawfully and without his consent, his lien is not affected by the loss of possession. An agent's lien is extinguished by his entering into an agreement, or acting in any character, inconsistent with its continuance; and may be waived by conduct indicating an intention to abandon it.

The lien of an agent is not affected by the circumstances that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation (*u*), or that the principal becomes bankrupt or insolvent (*v*), nor by any dealing by the principal with the property subject to the lien (*w*), after the lien has attached.

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| <p>(<i>p</i>) <i>Gunliffe v. Blackburn Building Society</i> (1884) 9 App. Cas. 857.</p> <p>(<i>q</i>) <i>London and County Bank v. Ratcliffe</i> (1881) 6 App. Cas. 722. <i>In re Llewellyn</i> [1891] 3 Ch. 145.</p> <p>(<i>r</i>) <i>Solly v. Rathbone</i> (1814) 2 M. & S. 298.</p> <p>(<i>s</i>) <i>Fisher v. Smith</i> (1878) 4 App. Cas. 1.</p> | <p>(<i>t</i>) <i>Bligh v. Davies</i> (1860) 28 Beav. 211.</p> <p>(<i>u</i>) <i>Curwen v. Milburn</i> (1889) 42 Ch. Div. 424.</p> <p>(<i>v</i>) <i>Ex parte Beall</i> (1883) 24 Ch. Div. 408.</p> <p>(<i>w</i>) <i>West of England Bank v. Batchelor</i> (1882) 51 L.J. Ch. 199.</p> |
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S. 222

Principal's Duty to Agent.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of lawful acts.

Illustrations.

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorises him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

["For *there*, i.e., Calcutta," in illustration (b), "we should probably read Singapur": Whitley Stokes's note, referring to s. 230. Or it must be assumed that in some other way *B* has made himself personally liable on the contract.]

Limits of agent's indemnity.—"If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor But it is not every loss or damage for which the agent will be entitled to re-imbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency" (x).

The right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one (y), or the principal had notice of it at the time when he conferred the authority (z); but if the rule or custom is unlawful or unreasonable, and was unknown to the principal he is under no liability to indemnify the agent against the consequences of acting on it (a).

- (x) S. A. s. 339, cited *arguendo* in *Duncan v. Hill*, L.R. 8 Ex. at p. 244.
 (y) *Davis v. Howard* (1890) 24 Q. B. D. 691. *Ex parte Bishop* (1880) 15 Ch. Div. 400.

- (z) *Seymour v. Bridge* (1885) 14 Q.B. D. 460.
 (a) *Perry v. Barnett* (1885) 15 Q.B. Div. 388; *Sheffield Corporation v. Barclay* [1907] A.C. 392.

Ratification by the principal will cure the agent's default and restore his ordinary right to indemnity (b).

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"Lawful."—A wagering contract is void, not unlawful (see s. 30). When therefore a suit is brought by a betting agent against his principal to recover a loss on betting paid by the agent, the principal cannot escape liability on the ground that the agent's act was *unlawful* (c). See notes to sec. 30 under the head "Agreements collateral to wagering contracts."

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith.

Illustrations.

(a) *A*, a decree-holder and entitled to execution of *B*'s goods requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C* in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay *C* and for *B*'s own expenses.

Bailiff.—A judgment creditor who requires an officer of the law to take specified goods, pointing them out as the goods of the debtor, makes that officer his agent, and must indemnify him if, acting in good faith, he commits a trespass in obeying the instructions (d).

Unlawful acts.—The preceding section deals with indemnity against the consequences of lawful acts; this section with the consequences of unlawful acts done in good faith. It is clearly settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal, whether on an express or implied promise (e). Any such promise is void as being contrary to public policy.

(b) *Hartas v. Ribbons* (1889) 22 Q.B. Div. 254.

(c) *Behari Lal v. Parbhu Lal* (1908) Punj. Rec. no 79; *Shiko Mal v. Latchman Das* (1901) 23 All. 165; *Chekka v. Gajjila* (1904) 14 Mad. L.J. 326; *Pirithi Singh v. Matu*

Ram ('32) A. L. 356.

(d) *Collins v. Evans* (1844) 5 Q.B. 820, 829, 830.

(e) Illegal insurance: *Alkins v. Jupe* (1877) 2 Q.P.D. 375. Illegal payment: *In re Parker* (1882) 21 Ch. Div. 408.

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Non-liability of employer of agent to do a criminal act.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations.

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C* and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

The rule in the text is elementary.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

✓ This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence. For the modern law of workmen's compensation, see Act VIII of 1923.

An agent is not, generally speaking, entitled to sue the principal on any contract made on his behalf, even if the agent is personally liable on the contract to the third party. If a merchant resident abroad employs an agent to buy goods, and the agent buys them and gives his own acceptance for the price, he cannot sue the principal as for goods sold, because the contract between them is not one of buying and selling but of agency (*f*). Similarly, if a broker buys goods on behalf of an undisclosed principal, he cannot sue the principal for non-acceptance of the goods (*g*), or for goods bargained and sold (*h*). His only remedy is an action for indemnity under sec. 222.

- (*f*) *Seymour v. Pychlaw* (1817) 1 B. & Ald. 14.
(*g*) *Telley v. Shand* (1872) 25 L.T. 58.

- (*h*) *White v. Benckendorff* (1873) 29 L.T. 475.

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226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and
consequences of agent's
contracts.

Illustrations.

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot in a suit by the principal set off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

This section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or the act is done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith (i). With regard to contracts and acts which are not actually authorized, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorized act or transaction with respect to persons having notice that the actual authority is being exceeded. This subject is dealt with by sec. 237 and the commentary thereon (j).

This section does not touch the conditions under which the agent can sue or be sued on the contract in his own name, as to which see secs. 230-234 below. The principal must be able to show that the third party dealt with the agent as such (k).

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated, from the part which is beyond

Principal how far
bound when agent
exceeds authority.

(i) *Hambro v. Burnand* (1904) 2 K.B. 10.
See also *Fazl Ilahi v. East Indian
Railway Co.* (1921) 43 All. 623.

(j) See also ss. 108 and 178 as to sales

and pledges by persons having
possession of goods or documents
of title thereto.

(k) *Sims v. Bond* (1833) 5 B. & Ad. 389.

Ss. 227, 228 his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration.

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

✓ "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued": S.A. sec. 170. This and the following section must be read subject to sec. 237 below.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Principal not bound when excess of agent's authority is not separable.

Illustration.

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

The law declared in this and the preceding section is concisely illustrated by an English case where *B*, an insurance broker at Liverpool, was authorized by *A* to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. *B* underwrote a policy for *Z* without *A*'s authority or knowledge for £150. *Z* did not know what the limits of *B*'s authority were, but it was well-known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorized amount in each case was not disclosed. The Court held that *A* was not liable for the insurance of £150 which he had not authorized, and the contract could not be divided so as to make him liable for £100 (*l*).

Further illustrations are supplied by Indian cases. *A* authorises *B* to draw bills to the extent of Rs. 200 each. *B* draws bills in the name of *A* for Rs. 1,000 each. *A* may repudiate the whole transaction (*m*).

A instructs *B* to enter into a contract for the delivery of cotton at the end of January. *B* enters into a contract for delivery by the middle of that month. *A* is not bound by the contract, and any custom of the market allowing *B* to deviate from *A*'s instructions will not be enforced by the Court (*n*).

(*l*) *Baines v. Ewing* (1866) L. R. 1 Ex. 320; *Fry v. Smellie* [1912] 3 K.B. 282, C.A.

(*m*) *Premabhai v. Brown* (1873) 10 B.H.

C. 319.

(*n*) *Arlapa Nayak v. Narsi Keshavji* (1817) 8 B.H.C.A.C. 19.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal. S. 229

Consequences of
notice given to agent.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C* and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set off against the price of the goods a debt owing to him from *C*.

The rule laid down in this section is intended to declare a general principle of law. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal. In other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings" (o).

By the terms of the present section, which are cited in the same judgment the application of the principle is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for the principal" (p). This is further enforced by illustration (b).

The following are illustrations from the English authorities of the rule stated in the section. An agent of an insurance company having negotiated a contract with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground of non-disclosure thereof by the assured (g). A ship sustained damage in the course of a voyage, and the master subsequently wrote a letter to the owner, but did not mention the fact of the damage. It was held that the master ought to have

(o) Judgment of Judicial Committee in *Rampal Singh v. Balbhadar Singh* (1902) 25 All. 1, 17; L.R. 29 I.A. 203.

(p) See *Chabildas Lalloobhai v. Dayal*

Mowji (1907) 31 Bom. 566, 581; L.R. 34 I.A. 179, 184.

(g) *Bawden v. London, etc., Assurance Co.* [1892] 2 Q.B. 534.

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communicated the fact, and, the owner having insured the ship after receipt of the letter, that the insurance was void on the ground of non-disclosure (r). When the knowledge of an agent is imputed to the principal, the principal is considered to have notice as from the time when he would have received notice if the agent had performed his duty and communicated with him with reasonable diligence (s).

The knowledge of an agent is not imputed to the principal unless it is of something that it is his duty as agent to communicate to the principal. Nor will notice given to or information acquired by an agent of circumstances which are not material to the business in respect of which he is employed be imputed to the principal (t).

An important exception to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a fraud on the principal. In such cases notice is not imputed to the principal of the fraud or the circumstances connected therewith, because of the extreme improbability of a person communicating his own fraud to the person defrauded (u). But the exception does not apply where the fraud is committed, not against the principal, but against a third person (v).

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor be bound by contracts, on behalf of principal.

Such a contract shall be presumed to exist in the following cases :—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :
- (2) where the agent does not disclose the name of his principal :
- (3) where the principal, though disclosed, cannot be sued.

Principle of the rule and exceptions.—The test question in cases within the principle of this section is always to whom credit was given by the

(r) *Gladstone v. King* (1813) 1 M. & S. 35; 14 R.R. 392.

(s) *Proudfot v. Montefiori* (1867) L.R. 2 Q. B. 511.

(t) *Tate v. Hyslop* (1885) 15 Q. B. D. 368. See also *Texas Co., Ltd. v.*

Bombay Banking Co. (1920) 44 Bom. 139; L.R. 46 I.A. 250.

(u) *Cave v. Cave* (1880) 15 Ch. D. 639.

(v) *Dixon v. Winch* [1900] 1 Ch. 736.

other party, or, if that cannot be proved as a fact, to whom it may reasonably be presumed to have been given. Thus, in the cases here specially mentioned, the party cannot be supposed to rely exclusively on a foreign principal whom, by general mercantile usage, the agent's contract is not understood to bind, or on a person whose name he does not know, and whose standing and credit he therefore cannot verify, or on a person or body who, for whatever reason, is on the face of the transaction not legally liable.

Contract to the contrary.—Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances (*w*). In the case of oral contracts the question is purely one of fact (*x*). If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole (*y*).

An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument (*z*), and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature (*a*). On the other hand, if words are added to the signature indicating that he signs "as an agent," or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party (*b*).

Agency coupled with interest.—It is also settled law that when an agent "has made a contract in the subject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name" (*c*). Such is the case of a factor (*d*), and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman," and a special property by reason of his lien (*e*).

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| <p>(<i>w</i>) See Bowstead on Agency, 7th ed., pp. 388 <i>sqq.</i></p> <p>(<i>z</i>) <i>Lakeman v. Mounstephen</i> (1874) L.R. 7 H.L. 17; <i>Long v. Millar</i> (1879) 4 C.P. Div. 650.</p> <p>(<i>y</i>) <i>Spittle v. Lavender</i> (1821) 5 Moo. 270.</p> <p>(<i>z</i>) <i>Calder v. Dobell</i> (1871) L.R. 6 C.P. 486.</p> | <p>(<i>a</i>) <i>Hutcheson v. Eaton</i> (1884) 13 Q.B. Div. 861.</p> <p>(<i>b</i>) <i>Redpath v. Wigg</i> (1866) L.R. 1 Ex. 335.</p> <p>(<i>c</i>) 2 Sm. L.C. 415.</p> <p>(<i>d</i>) <i>Fisher v. Marsh</i> (1865) 6 B. & S. 411.</p> <p>(<i>e</i>) <i>Williams v. Millington</i> (1788) 1 H.Bl. 81, 2 R.R. 724.</p> |
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The like rule is laid down by Indian Courts: "Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name" (f). This is not a real exception to the rule laid down at the beginning of the section, the agent being in such a case virtually a principal to the extent of his interest in the contract.

Whenever an agent has entered into contract in such terms as to be personally liable, he has a corresponding right to sue thereon (g), and this right is not affected by this principal's renunciation of the contract (h).

Presumed exceptions: Foreign principal.—This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner, "according to the universal understanding of merchants of and all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner" (i); for "a foreign constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account (j). Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue (k) nor be sued (l) on it. On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstance that the principal is a foreigner gives rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary (m).

A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such company in India, it can be enforced against the agents personally unless the foreign company is in writing made the contracting party, and the contract is made directly in its name (n).

Principal undisclosed.—The rule under this head is so well settled that it will suffice to refer to recent Indian cases without going back here to the ultimate authorities. The qualifications expressed in the following sections to sec. 234 inclusive are now part of the doctrine requiring most

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| (f) <i>Subrahmania v. Narayanan</i> (1900) 24 Mad. 130. | Q.B. 598, 605. |
| (g) <i>Agacio v. Forbes</i> (1861) 14 Moo. P. C. 160. | (k) <i>Elbinger Actien-Gesellschaft v. Claye</i> (1873) L.R. 8 Q.B. 473. |
| (h) <i>Short v. Spackman</i> (1831) 2 B. & Ad. 962. | (l) <i>Hutton v. Bulloch</i> (1874) L.R. 9 Q.B. 572. |
| (i) <i>Thompson v. Davenport</i> (1829) 9 B. & C. at p. 87; 32 R. R. at p. 585. | (m) See the authorities critically reviewed in <i>Miller, Gibb & Co. v. Smith & Tyren</i> [1917] 2 K.B. 141 C.A. |
| (j) <i>Armstrong v. Stokes</i> (1872) L. R. 7 | (n) <i>Tulika Basavaraju v. Parry & Co.</i> (1903) 27 Mad. 315. |

attention. The decisions establishing them contain ample proof of the rule. The same principles are followed in Indian Courts. The honorary secretary, therefore, of a school alleged to have been maintained by an association in London is personally liable for the rent of a house hired by him in his name for the purposes of the school (o). But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not disclose the name of the principal, the knowledge being in such a case equivalent to disclosure (p). Thus the secretary of a club cannot be sued personally for work done for the club, unless he has pledged his personal credit (q). And similarly he cannot sue a member on behalf of the club for goods supplied to him (r).

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract; but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of this section will apply (s). Thus if the principal is undisclosed, and the note says "sold for you to my principals," i.e., I, your broker, have made a contract for my principals, the buyers, the broker is merely an intermediary, and he is not personally liable to his employer (t). For the same reason he is not liable if the contract says "bought for you from my principals" (u), and the terms "sold by order and for account of transfer to selves for principal," the broker signing as broker, do not bind him personally, and also do not entitle him to sue in his own name for failure to deliver (v). But the broker is personally liable if the contract says "bought

(o) *Bhojabhai v. Hayem Samuel* (1898) 22 Bom. 754.

(p) *Mackinnon v. Lang* (1881) 5 Bom. 584.

(q) *North-Western Provinces Club v. Sadullah* (1898) 20 All. 497.

(r) *Michael v. Briggs* (1890) 14 Mad. 362.

(s) *Patiram v. Kankanarrah Co., Ltd.* (1915) 42 Cal. 1050, 1065-66.

(t) *Southwell v. Bowditch* (1876) L. R. 1 C.P.D. 374.

(u) *Patiram v. Kankanarrah Co., Ltd.* (1915) 42 Cal. 1050.

(v) *Nanda Lal Roy v. Gurupada Haldar* (1924) 51 Cal. 583, 81 I.C. 721.

Ss. 230, 131 of you for my principals," for here the contract is one of purchase by the broker on behalf of undisclosed principals (*w*).

Principal not liable.—There is a rather curious class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy (*x*).

Sovereign States as principals.—Sovereign States and their rulers would seem to come within the description of possible principals who cannot be sued; but there is a special rule for this case, and it is settled, for sufficient reasons of good sense and policy, that an agent contracting even in his own name on behalf of a Government is not to be considered as personally a party to the contract. No man would accept public office at such risk as a different rule would involve (*y*). As regards British India the law is that a foreign or native ruler may be sued in a competent Court in India in certain cases with the consent of the Governor-General in Council. Where no such consent is given, it has been held that a suit may be brought against the agent appointed by the native ruler for the purposes of the business in respect of which the suit is brought (*z*).

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

"Discloses himself."—The High Court of Bombay is of opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and

(*w*) *Southwell v. Bowditch* (1876) L.R. 1 C.P.D. 374, at p. 379.

(*z*) *Re Empress Engineering Co.* (1880) 16 Ch. Div. 125; *Lakshmishankar v. Motiram* (1904) 6 Bom. L.R. 1106.

(*y*) *Palmer v. Hutchinson* (1881) 6 App. Ca. at p. 626; *Grant v. Secretary of State for India* (1877); 2 C.P.D. at p. 461.

(*z*) *Abdul Ali v. Goldstein* (1910) *Punj. Rec.* No. 43.

that it does not arise where the disclosure is made by some other person or the information reaches him from some other source (a).

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232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Performance of contract with agent supposed to be principal.

Illustration.

A, who owes 500 rupees to *B*, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set off *A*'s debt.

Sections 231, 232 and 234, taken together, fairly represent modern English law as regards the rights of undisclosed principals.

Equities between agent and third party.—An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities; that is, the third party may use against the principal any defence that would have availed him against the agent (b). "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent" (c). "The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George v. Clagett* (d) That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal" (e).

The application of the rule is limited to liquidated demands (f); but it "is not confined to the sale of goods. If *A* employs *B* as his agent to make any contract for him, or to receive money for him, and *B* makes a contract with *C* or employs *C* as his agent, if *B* is a person who would be reasonably

- (a) *Lakshmandas v. Lane* (1904) 32 Bom. 356; *Kapurji Magniram v. Panaji Devichand*, 53 Bom. 110.
(b) *George v. Clagett* (1797) 7 T.R. 359; *Sims v. Bond* (1833) 5 B. & Ad. 389, 393.

- (c) *Willes, J.*, in *Dresser v. Norwood* (1863) 14 C.B. (N.S.) 574 at 589.
(d) Note (b), above.
(e) *Turner v. Thomas* (1871) L.R. 6. C.P. 610, 613, per *Willes, J.*
(f) *Ib.*

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supposed to be acting as a principal, and is not known or suspected by *C* to be acting as an agent for any one, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal. If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences" (*g*).

In England it is not necessary for the third party who dealt with the agent as a principal to go beyond showing that he believed him to be a principal. Means of knowledge or "reason to suspect" appears to be material only as tending to negative the alleged belief (*h*). The words of both secs. 231 and 232, however, are quite clear on this point. But there must be actual belief that one is dealing with a principal. Ignorance or doubt whether the apparent principal is a principal or an agent is not enough; for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such (*i*).

The second paragraph of sec. 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of person
dealing with agent
personally liable.

Illustration.

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

In cases where the agent is personally liable.—As to the cases where an agent is personally liable, see sec. 230 and commentary thereon.

Creditor's election.—A person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless the liability of the principal has been excluded by the express terms of the contract. He may look directly to the principal, even though he was not aware of the existence of the principal when he made the contract, and even though the agent is personally liable. This is because the law which makes the agent liable does not detract from the liability of the principal (*j*). *A*

(*g*) *Montagu v. Forwood* [1893] 2 Q.B. 350, 355.

(*h*) *Borries v. Imperial Ottoman Bank* (1873) L.R. 9 C.P. 38.

(*i*) *Cooke v. Eshelby* (1887) 12 App. Ca. 271.

(*j*) *Calder v. Dobell* (1871) L.R. 6 C.P. 486.

company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator authorised by the company to borrow for the purposes of the winding up (k). But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied (l), and though the creditor was not aware of the existence of a principal when he sued the agent (m). But where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the reason being that nothing short of a judgment against the agent can amount to a binding election on the part of the creditor to abandon the right to proceed against the principal (n). In short, as in English law, the liability is, not joint but alternative (o).

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234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Liability of pretended agent.

Implied warranty of authority.—This section is in accordance with the English law as established by *Collen v. Wright* (p). It applies not only to the case of a person who represents that he has authority from another when he has no authority whatever, but to the case of a person who represents that he has a certain authority from another when he has authority of another description (q). The duty is grounded on an implied warranty

(k) *In re Ganges Steam Car Co.* (1891) 18 Cal. 31.

(l) *Shivlal Motilal v. Birdichand* (1917) 19 Bom. L.R. 370; *Bir Bhaddar v. Sarju Prasad* (1887) 9 All. 681; *Priestly v. Fernie* (1865) 3 H. & C. 977; and see *Morel v. Westmoreland* [1904] A.C. 11.

(m) *Shivlal Motilal v. Birdichand* (1917) 19 Bom. L.R. 370, 380-381.

(n) *Raman v. Vairavan* (1883) 7 Mad. 392, citing *Curtis v. Williamson* (1874) L.R. 10 Q.B. 57.

(o) *Kattikrishnan Nair v. Appa Nair* (1926) 49 Mad. 900.

(p) (1857) 7 E. & B. 301, in *Ex. Ch. 8 E. & B. 647*. See *Hasanbhoj v. Olapham* (1882) 7 Bom. 31, 66.

(q) *Ganpat Prasad v. Sarju* (1911) 9 All. L.J. 8.

S. 235 by the agent that he has authority, and the action, being in contract, lies even if the agent honestly believed he had authority. The doctrine has been fully confirmed by later authorities and by the House of Lords (r). An agent reports to his principal that he has made a bargain for his principal with a third person. The report is incorrect for the contract is not complete and goes off altogether. In such a case the agent does not represent himself to be the agent of the third party, and is not liable under the rule in *Collen v. Wright*. He is only liable for any actual damage from the principal acting on his erroneous statement (s).

A public servant acting on behalf of the Government is not deemed to warrant his authority, nor does he make himself personally liable on the contract (t), and for the same reason of policy.

If a man goes through the form of contracting as an agent, but warns the other party that he has at the time no authority, he is obviously not liable under this section (u).

✓ **Representation must be effective.**—The liability of a pretended agent under this section does not arise, unless the representation that he is the agent of another is false, and also induces the person to whom the representation is made to deal with him as such agent. A representation by the defendant to the plaintiff that she is the duly authorized agent of her minor son does not render her liable under this section, if the plaintiff knows that the son is a minor. For a minor cannot appoint an agent (s. 183 above), and consequently no warranty such as would support a suit could arise out of such a representation (v).

Measure of damages.—In England, the action being founded on contract, and not on tort, the measure of damages is the loss sustained as the consequence of the breach of the implied warranty. In other words, the person acting on the misrepresentation is entitled not only to recover any loss actually sustained through being misled, but also any profit which he would have gained if the representation had been true (w).

It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty (x).

(r) *Starkey v. Bank of England* [1903] A. C. 114.

(s) *Salvesen & Co. v. Rederi Aktielaget Nordstjernen* [1905] A. C. 302.

(t) *Dunn v. Macdonald* (1897) 1 Q.B. 555 C. A.

(u) *Halbot v. Lens* [1901] 1 Ch. 344.

(v) *Shet Manibhai v. Bai Rupaliba* (1899) 24 Bom. 166, citing *Beattie v. Lord Ebury*, L.R. 7 H.L. 102.

(w) *Firbank v. Humphreys* (1886) 18 Q.B. Div. 54.

(x) See *Vairavan Chettiar v. Avicha Chettiar* (1915) 38 Mad. 275, 278.

- 236.** A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.
- Ss. 236, 237**
- Person falsely contracting as agent not entitled to performance.

English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named. It does not seem possible, however, to read any such distinction into the perfectly general language of the present section ; and, indeed, the English rule has never been settled by a Court of appeal. The High Court of Calcutta has held that this section is not restricted to cases where an agent purports to act for a named principal (y). If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, the present section at once applies, and he cannot sue on the contract (z).

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, e.g., made a charter-party "as owner of the ship A," another person cannot be allowed to sue on the contract as an undisclosed principal (a).

- 237.** When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.
- Liability of principal inducing belief that agent's unauthorized acts were authorized.

Illustrations.

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments indorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Ostensible authority.—This section must, in point of fact, overlap sec. 188 in many cases, but the principles are distinct. Under sec. 188 the

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| <p>(y) <i>Sewdutt Roy Maskara v. Nahapiet</i> (1907) 34 Cal. 628; <i>Nanda Lal Roy v. Gurnpada Haldar</i> (1924) 51 Cal. 588.</p> <p>(z) <i>Ramji Das v. Janki Das</i> (1912) 39 Cal. 802.</p> | <p>(a) <i>Humble v. Hunter</i> (1848) 12 Q. B. 310; <i>Rederi Aktienbolaget Transatlantic v. Fred Drughorn</i> [1918] 1 K.B. 394 C.A., affirmed in H. L. [1919] A.C. 203.</p> |
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S. 237 question is of the true construction to be put upon a real, though perhaps not verbally expressed, authority. Here the liability is by estoppel, and independent of the apparent agent having any real authority at all; the question is only whether he was held out as being authorized; and this includes the case of secret restrictions on any existing authority of a well-known kind. It is a "well-established principle that, if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority" (b). "Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby": S.A. sec. 127. Where a transaction undertaken by an agent on behalf of his principal is within his express authority the principal is bound without regard to the agent's motives, and inquiry whether the agent was abusing his authority for his own purposes is not admissible (c).

Very many illustrations of the principle are to be found in the English authorities, of which the following may be given as typical examples. Where a principal wrote to a third person saying he had authorized the agent to see him, and, if possible, to come to an amicable arrangement, and gave the agent instruction not to settle for less than a certain amount, it was held that he was bound by a settlement by the agent for less than that amount, the third person having no knowledge of the verbal instructions (d). An agent was authorized, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, and it was held that the principal was bound by a loan on such exceptional terms made by a third person who had no notice that the agent was exceeding his authority, although no emergency had in fact arisen (e). Where a solicitor was authorized to sue for a debt, it was held that a tender to his managing clerk was equivalent to a tender to the client, though the clerk was forbidden to receive payment he not having disclaimed the authority at the time of the tender (f).

It must be understood in illustration (b) that the instruments are not handed to B merely for safe custody.

The Privy Council case of *Ram Pertab v. Marshall* (g), which, however, was not decided with reference to the section, affords an additional illustration.

- (b) Cockburn, C. J., in *Edmunds v. Bushell* (1865) L. R. 1 Q.B. 97, 99.
- (c) *Hambro v. Burnard* [1904] 2 K.B. 10 C.A.
- (d) *Trickett v. Tomlinson* (1863) 13 C.B. N. S. 663. See also *National Bolivian Navigation Co. v. Wilson* (1880) 5 App. Cas. 176, 209.

- (e) *Montaignac v. Shitta* (1890) 15 App. Cas. 357. And see *Bryant v. Quebec Bank* [1893] A.C. 179.
- (f) *Moffat v. Parsons* (1814) 1 Marsh 55.
- (g) (1899) 26 Cal. 701. See also *Fazl Ilahi v. East Indian Railway* (1921) 43 All. 62.

In that case the principal was held liable upon a contract entered into by his agent in excess of his authority, the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

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Notice of excess of authority.—No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that the act is unauthorized. This proposition is so obvious that it would be superfluous to cite authorities in support of it.

"On behalf of his principal."—A principal is not bound by any act done by his agent which he has not in fact authorized, unless it is done in the course of the agent's employment on his behalf (*h*), and is within the scope of the agent's apparent authority (*i*).

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Effect, on agreement,
of misrepresentation or
fraud by agent.

Illustrations.

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable as between *B* and *C* at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

Course of employment.—The accordance of this section with the modern common law is well shown in a judgment delivered in the Judicial Committee by Lord Lindley: "The law upon this subject cannot be better expressed than it was by the acting Chief Justice [of New South Wales] in this case. He said: 'Although the particular act which gives the cause of action may not be authorized, still, if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant'. This doctrine has been approved and acted upon by this Board in *Mackay v. Commercial Bank of New Brunswick* (*j*), *Swire v. Francis* (*k*); and the doctrine is as applicable to incorporated companies as to individuals. All

(h) *McGowan v. Dyer* (1873) L. R. 8 Q. B. 141.

(i) *Morarji Premji v. Mulji Ranchhod*

Ved & Co. (1923) 48 Bom. 20.

(j) (1874) L.R. 5 P.C. 394.

(k) (1877) 3 App. Co. 106.

S. 238 doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank* (l), which is the leading case on the subject. It was distinctly approved by Lord Selborne, in the House of Lords, in *Houldsworth v. City of Glasgow Bank* (m), and has been followed in numerous other cases" (n).

In the passage here referred to as now the leading authority, Willes, J., delivering the judgment of the Exchequer Chamber said :

✓ "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved (o). That principle is acted upon every day in running down cases. It has been applied also [in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by-laws, and the like]. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in" (p). The words "for the master's benefit," which occur in this judgment, were applicable to the case before the Court, but must not be taken as restricting the scope of the rule, though there was for some time considerable authority for that reading. If the act belongs to an authorized class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit. (A solicitor's managing clerk, having authority to transact conveyancing business on behalf of the firm, took a client's instructions to sell some property (by his own advice, given with fraudulent intent) and got the deeds from her (which he might properly have done). Then he procured her execution of instruments, being in fact conveyances to himself, which the client supposed (as intended by him) to be merely formal papers; and having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purposes. The House of Lords (q) held that this was a fraud com-

(l) (1867) L. R. 2 Ex. 259.

(m) (1880) 5 App. Ca. at p. 326.

(n) *Citizen's Life Assurance Co. v. Brown* [1904] A.C. 433, 427.

(o) See *Laugher v. Pointer* (1826) 5 B. & C. 547, at p. 554, 29 R.R. at pp. 320, 321.

(p) L.R. 2 Ex. 259 at pp. 265, 266.

(q) *Lloyd v. Grace Smith & Co.* [1912] A.C. 716, reversing the decision of the C.A. [1911] 2 K.B. 489; *Dina Bandhu Saha v. Abdul Latif Molla* (1923) 50 Cal. 258.

mitted by the manager in the course of his employment for which the principal was answerable. It is clear from the judgments that the rule applies to ostensible as well as to actual authority.

✓ **Bribery of agent.**—The rights of the principal against an agent in respect of bribes received in the course of the agency are dealt with in the commentary to sec. 216. In addition to what is said there it may be mentioned that the receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time (r).

✓ As against the person promising or giving anything in the nature of a bribe to an agent, the principal may avoid any contract made or negotiated by the agent, or in the making of which the agent was in any way concerned, whether he was in fact influenced by the bribery or not, it being conclusively presumed against the briber that he was so influenced (s).

✓ An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe, whether he was induced by the promise to depart from his duty to the principal or not (t). Such a promise, being founded on a corrupt consideration, cannot be enforced by law.

Right of principal to follow property into hands of third persons.—Where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorized the principal is entitled, as against the agent and third person, subject to any enactment to the contrary (u), to recover the property, wheresoever it may be found (v).

Personal liability of agent to repay money received to principal's use.—If money is paid to an agent on the principal's behalf, and the payer becomes entitled, as against the principal, to repayment, the agent, as a general rule, is not liable to repay it even though the money is still in his possession (w).

But an agent is personally liable to repay money paid to him under a mistake of fact (x), unless he has paid it over to the principal in good faith, or unless he has dealt to his detriment with the principal in the belief that the

(r) *Boston Fishing Co. v. Ansell* (1888) 39 Ch. Div. 339.

(s) *Shipway v. Broadwood* [1899] 1 Q.B. 369; *Bartram v. Lloyd* (1904) 90 L. T. 357.

(t) *Harrington v. Victoria Dock Co.* (1878) 3 Q.B. D. 549.

(u) See, for instance, sec. 178; and sec. 27 of Indian Sale of Goods Act, above, as to sales and pledges by persons in possession of goods

or of the documents of title thereto.

(v) *Farquharson v. King* [1902] A.C. 325; *Colonial Bank v. Cady* (1890) 15 App. Cas. 267; *Mussamat Ram Kaur v. Raghbir Sing* (1920) 2 Lah. L.J. 516.

(w) *Taylor v. Metropolitan Ry. Co.* [1906] 2 K. B. 55.

(x) *Newall v. Tomlinson* (1871) L. R. 6 C.P. 405.

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payment was a valid one, before receiving notice of the intention of the payer to demand repayment (y). Similar principles apply where the money is paid in respect of a voidable transaction (z), or for a consideration which totally fails (a), or under duress (b), or in consequence of any fraud or wrong to which the agent is not a party (c). But if the agent has been a party to the wrongful act, payment over is no defence in the case of wrong-doers (d). An agent is also personally liable, notwithstanding that he may have paid the money over in good faith, if it was paid to him in regard to a contract made in his personal capacity (e).

Money received by agent from a third person by fraud.—
In a Bombay case an agent defrauded a third party of a sum of money and then used the money to discharge *pro tanto* a debt which he owed to the principal. The Court held that as the principal did not know, and had not the means of knowing that the money was wrongfully obtained, the third party had no right to follow the money and to require the principal to repay it (f).

(y) *Holland v. Russell* (1863) 4 B. & S.

14.

(z) *Holland v. Russell*, note (v) above.

(a) *Ex parte Bird* (1851) 4 De G. & S.
273.

(b) *Owen v. Cronk* [1895] 1 Q. B. 265.

(c) *East India Co. v. Tritton* (1824) 5

D. & R. 214.

(d) *Ex parte Edwards* (1884) 13 Q.B.D.
717.

(e) *Newall v. Tomlinson* (1871) L. R. 6
C. P. 405.

(f) *Morarji v. Mulji Ved & Co.* (1923)
48 Bom. 20.

THE INDIAN SALE OF GOODS ACT, 1930.

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THE INDIAN SALE OF GOODS ACT

No. III of 1930

[PASSED BY THE INDIAN LEGISLATURE.]

*(Received the assent of the Governor General on the 15th
March, 1930.)*

An Act to define and amend the law relating to the sale of goods.

WHEREAS it is expedient to define and amend the law relating to the sale of goods ; It is hereby enacted as follows :—

CHAPTER I.

Preliminary.

Short title, extent
and commencement.

1. (1) This Act may be called the Indian Sale of Goods Act, 1930.

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(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the first day of July, 1930.

Sale of Goods Act.—This Act codifies in a separate enactment the law relating to the sale of goods which was contained in secs. 76 to 123 of the Indian Contract Act, 1872. Those sections have been repealed by the present Act. The Act is based principally on the English Sale of Goods Act, 1893.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “buyer” means a person who buys or agrees to buy goods ;

(2) “delivery” means voluntary transfer of possession from one person to another ;

(3) goods are said to be in a “deliverable state” when they are in such state that the buyer would under the contract be bound to take delivery of them ;

- S. 2 ✓(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;
- (5) "fault" means wrongful act or default ;
- (6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;
- (7) "goods" means every kind of moveable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;
- (8) a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;
- ✓(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods ;
- (10) "price" means the money consideration for a sale of goods ;
- (11) "property" means the general property in goods, and not merely a special property ;
- (12) "quality of goods" includes their state or condition ;
- (13) "seller" means a person who sells or agrees to sell goods ;

- (14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made; and S. 2
- (15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

Clause (2) : Delivery.—As a general rule delivery of goods may be made by doing anything which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf. Delivery may be actual or constructive. It is actual when the goods themselves are delivered to the buyer or the key of a warehouse containing the goods is handed over to him. It is constructive as where before sale the goods are in the possession of a warehouseman as bailee for the seller, and after sale he agrees to hold them as bailee for the buyer. See sec. 33 (Delivery).

Clause (3) : Deliverable State.—See secs. 20, 21, 22, 23 and 36 (5).

Clause (4) : Documents of title.—There were different expressions used in the Contract Act to convey the same idea. Thus the expression used in secs. 102 and 108 of that Act was "document showing title to goods," in sec. 103 it was "instrument of title to goods," and in sec. 178 it was "document of title to goods." The present Act uses a uniform expression throughout, namely, "documents of title to goods." It is to be observed that the definition of "documents of title to goods" includes a railway receipt. This gives effect to the ruling of the Privy Council in *Ramdas v. Amarchand* (a). What was held in that case was that possession of goods covered by a railway receipt may be transferred by *endorsement* of the receipt.

Clause (6) : Future goods.—The word "produced" in the definition of future goods has reference to agricultural products. See "Cl. (7) : Goods" below.

Clause (7) : Goods.—"Goods" means every kind of movable property other than actionable claims and money. "Movable property" is defined in the General Clauses Act, 1897, sec. 3 (34) as property of every description except immovable property.

Actionable claim is defined in sec. 3 of the Transfer of Property Act, 1882. The expression used in the English Law is "chase in action" or "thing in action." *Thing in action* is where a person has not the enjoyment of the thing, but merely a right to recover it by a suit or *action*. A debt is a thing in action or actionable claim. The mode of transfer of an actionable claim and the rights of the transferee of such a claim are dealt with in sec. 130 *et seq.* of the Transfer of Property Act. *Shares* according to the English law are

(a) (1916) 43 I. A. 164, 40 Bom. 630.

- S. 2** things in action. According to the Indian law as laid down by the Privy Council in *Manekji v. Wadhval (b)*, they are "goods." "Shares," therefore, are included in the definition of goods in this Act.

"Money" means current money. Current money is not "goods." Old and rare coins, however, may be goods.

Goods may be *specific*, as where there is a contract for the sale of a specified ring or a watch or a horse. Or they may be *unascertained* as where there is a contract for the sale of 50 cwts. of sugar out of 1,000 cwts. lying in the seller's warehouse. The goods *exist in bulk*, but they are not ascertained until 50 cwts. are set aside and appropriated to the contract. Goods again may be future goods, as where they *do not exist* at the time of the contract, but are *to be* manufactured or produced or acquired by the seller after the making of the contract of sale.

Clause (8): Insolvent.—It is not necessary to constitute a person an "insolvent" within the meaning of *this Act* that he should have committed an act of insolvency. Under the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, a person cannot be adjudicated an insolvent unless he has committed an act of insolvency. A list of the acts of insolvency is given in sec. 9 of the Presidency-towns Insolvency Act and in sec. 6 of the Provincial Insolvency Act. Under the Sale of Goods Act a person is said to be insolvent if he has ceased to pay his debts in the ordinary course of business or cannot pay them as they become due, *whether he has committed an act of insolvency or not*.

Clause (9): Mercantile agent.—This definition is taken from the English Factors Act, sec. 1 (1). The word "his" which occurs in that section before the word "business" seems to have been omitted by a printer's mistake. See note to sec. 27 below, "Mercantile agent."

Clause (10): Price.—The two essential elements of a contract of sale are (1) goods and (2) price. Price is the money consideration for the sale.

Clause (11): Property.—Property in this Act means the *general* property in goods as distinguished from *special* property. If *A* who owns goods pledges them to *B*, *A* has the general property in the goods, while *B* has a special property or interest in them.

Property means ownership. When it is said in this Act that the property in the goods is in a certain person it means that that person is the owner of the goods. When it is said that the property in the goods has passed from the seller to the buyer, it means that the goods have ceased to be the property of the seller and have become the property of the buyer.

(b) (1926) 53 I. A. 92, 50 Bom. 360, 28 Bom. L.R. 777, 94 I.C. 824, ('26) A.P.C. 338.

The general rule is that, unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery of the goods has been made to the buyer or not. As to the passing of property, see secs. 18—24. As to the passing of risk, see sec. 26.

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Clause (14) : Specific goods.—The expression “specific” goods is used in contradistinction to generic or unascertained goods. Thus if *A* agrees to sell his horse to *B*, the contract is for the sale of specific goods. But if *A*, having a quantity of sugar in bulk, more than sufficient to fill twenty hogsheads, agrees to sell to *B* twenty hogsheads of it, the contract is for the sale of unascertained goods. The distinction between specific and unascertained goods is important as will be seen from the notes under sec. 18 and subsequent sections.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

Application of provisions of Act IX of 1872.

Application of provisions of Contract Act.—Though the law relating to the sale of goods is now enacted in a separate Act, the unrepealed provisions of the Contract Act are to continue to apply to contracts for the sale of goods. Thus in a suit for damages for breach of a contract of sale, the measure of damages is that prescribed by secs. 73 and 74 of the Contract Act. See sec. 56 below (Damages for non-acceptance) and sec. 57 below (Damages for non-delivery).

CHAPTER II.

FORMATION OF THE CONTRACT.

Contract of Sale.

✓ **4. (1)** A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

Sale and agreement to sell.

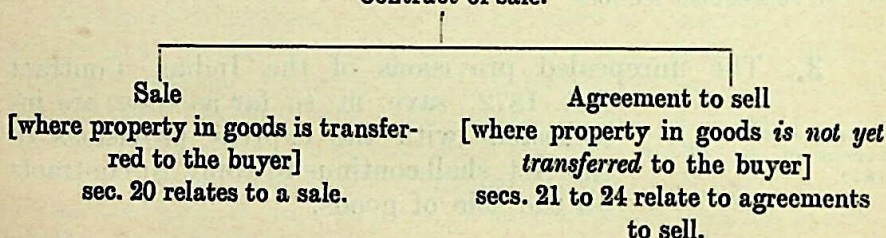
(2) A contract of sale may be absolute or conditional.

S. 4 (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Sub-sec. (1) : Contract of Sale.—The term “contract of sale” is a generic term. It includes an agreement to sell as well as a sale, formerly known as a “bargain and sale.”

Contract of sale.



Property is defined in sec. 2 (11) as meaning the general property in the goods as distinguished from special property such as that of a pledgee or bailee. The essence of *sale* is the transfer of the general property in the goods from the seller to the buyer, for a price. When under a contract of sale the property in the goods is *transferred* from the seller to the buyer, so that the seller ceases to be the owner of the goods and the buyer becomes the owner, the contract of sale is called a *sale*. But where the *transfer* of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an *agreement to sell*. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled.

A contract of sale may be *executed* or *executory*. When it is executed, it is a sale; when it is executory, it is an agreement to sell.

Seller.—“Seller” means a person who *sells* or *agrees to sell* goods; see sec. 2 (13). This is in conformity with the definition of a contract of sale which includes an *agreement to sell* as well as a *sale*.

Buyer.—“Buyer” means a person who *buys* or *agrees to buy* goods. An option to buy, however, is not the same thing as an agreement to buy. The agreement comes into existence only when the option is exercised (c).

(c) *Helby v. Matthews* [1895], A. C. 471; *Belsize Motor Supply Co. v. Cox*

[1914] 1 K. B. 244.

Property.—See note below, “Sale and agreement to sell.”

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Sale by part-owner.—Thus a partner may sell to his firm and the firm may sell to a partner. As to sale by a joint owner to a *third* person, see sec. 28 below (Sale by one of joint owners).

Sub-sec. (2) : Absolute and conditional contracts of sale.—A contract of sale may be absolute or conditional. It is absolute when it is a sale pure and simple, transferring the property absolutely to the buyer. It is conditional if there are conditions annexed to the contract by the parties. These conditions may be conditions precedent or conditions subsequent. Where an *agreement to sell* is to become a sale on the fulfilment of a particular condition, the condition is a condition precedent. Instances of conditions precedent are given in the note under sub-sec. (3) below. Where there is an *actual sale* passing the property to the buyer, but subject to defeasance on the happening of some specified event, the case is one of a condition subsequent. Thus on a sale of goods by auction, there is usually a condition that if the goods are not paid for within a specified time they may be re-sold. In such a case there is an *actual sale* passing the property to the buyer, but if the buyer does not pay, the sale goes off, and the property in the goods reverts in the seller (d).

Sub-sec. (3) : Sale and Agreement to sell.—As stated above, where the property in the goods is *transferred* from the seller to the buyer, the transaction is one of sale. But when the transfer of property is to take place *at a future time* or it is to take place *subject to some conditions thereafter to be fulfilled*, the transaction is an *agreement to sell*. The conditions may have to be fulfilled by the seller or they may have to be fulfilled by the buyer. Thus where the goods have to be weighed or measured by the seller for the purpose of ascertaining the price, the transaction is an agreement to sell; but it becomes a *sale* and the property in the goods passes to the buyer when the goods are weighed or measured and the buyer has notice thereof (s. 22). Similarly, if goods are delivered to the buyer on approval or “on sale or return,” the transaction is an agreement to sell, but it becomes a sale and the property in the goods passes to the buyer where the buyer signifies his approval or acceptance to the seller (s. 24). These are cases of *conditions precedent* referred to in the preceding note. The agreement to sell becomes a sale on the fulfilment of the conditions.

Jan **Points of distinction between a sale and an agreement to sell.**—The following are some of the important points of distinction between a sale and an agreement to sell :—

- (1) A sale effects a transfer of the general property in the goods to the buyer, in other words, it creates a *jus in rem*. An agreement to

(d) Chalmers' Sale of Goods, 10th ed., pp. 6, 7.

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sell gives to either party a remedy against the *person* and general estate of the other for any default in fulfilling this part of the agreement, in other words, it creates a *jus in personam*.

- (2) If there has been a *sale*, and the buyer fails to pay for the goods, the seller may sue for the price; see sec. 55 (suit for price). Where there is merely an *agreement to sell*, and the buyer fails to accept and pay for the goods, the seller can only sue for *damages*; see sec. 56 (damages for non-acceptance).
- (3) If there is an *agreement to sell*, and the seller commits a breach, the buyer has only a personal remedy against the seller, namely, a claim for damages. The goods are still the property of the seller, and he can dispose of them as he likes. But if there has been a *sale*, and the seller commits a breach, the buyer has not only a personal remedy against the seller, but also the remedies which an owner has in respect of the goods themselves, such as a suit for conversion or detinue. In many cases, too, he can follow the goods in the hands of third persons. The reason is that on a *sale* the *property* in the goods passes to the buyer, and he becomes the *proprietor* or owner of the goods.
- (4) If there is an *agreement to sell*, and the goods are destroyed, the loss (unless otherwise agreed) falls on the seller, while, if there has been a *sale*, the loss (unless otherwise agreed) falls upon the buyer, though the goods may never have come into his possession (e). See sec. 26 below.

Sub-sec. (4) : Agreement to sell becoming a sale.—See note above under sub-sec. (3), and note to sec. 26, “Analysis of sections relating to passing of property.”

Mortgage, pledge and hypothecation of goods.—The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security. See sec. 66 (3).

A mortgage of goods is a transfer of the *general* property in goods from the mortgagor to the mortgagee to secure a debt (f). A pledge is a bailment of goods by one person to another to secure payment of a debt (g). A mortgage of goods may be created without delivery of possession, but a pledge cannot be created without such delivery. A mortgage passes the general property in the goods, while a pledge passes a special property only. A hypothecation of goods is an equitable charge on goods, without possession, but not amounting to a mortgage.

(e) Chalmers' Sale of Goods Act, 10th ed., p. 9.

722, 731.

(f) *Keith v. Burrows* (1876) 1 C. P. D.

(g) Indian Contract Act, 1872, s. 172.

Formalities of the Contract.

✓5. (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

Contract of sale how made.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

✓ Contract of sale how made.—A contract of sale like any other contract is made by an offer on the one hand and acceptance on the other.

(A contract of sale may be made in writing or word of mouth; it may also be implied from the conduct of the parties or the course of business between the parties (h). Thus if a man goes into a shop and selects an article exposed for the sale in the shop and takes it away, it is a purchase of the article at the price affixed to it, if or no price is affixed, then at a reasonable price;) see sec. 9 (Ascertainment of price).

Contracts with corporations are in some cases required to be effected by instrument under seal. Such contracts are not affected by the present section. They are saved by the words, "subject to the provisions of any law for the time being in force."

Subject-matter of Contract.

✓6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

Existing or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

(h) *Walter Smith v. Ahmed Abdeenbhoj* (1935) 69 M.L.J. 341, 157 I.C. 9, ('35) A. PC. 154.

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Sub-sec. (1) : Existing or future goods.—The goods which form the subject of a contract of sale may be existing goods owned or possessed by the seller, or goods to be manufactured or acquired or produced by the seller after the making of a contract of sale, called future goods. See sec. 2 (6) [Future goods].

A contracts on the 1st January 1930 to sell to *B* shares in a certain company, to be delivered and paid for on the 1st March 1930. *A*, at the time of making the contract, is not in possession of any shares. This is a valid contract, though *A* can acquire the shares only by purchase.

Sub-sec. (2) : Acquisition of goods depending on a contingency. *A* agrees to sell hemp to *B* to be delivered "on arrival per *Fanny and Almira*." If the ship arrives, but with no hemp on board, the seller is not liable, for the contract is to deliver the goods only if the goods should arrive (i). But if *A* agrees to sell "50 cases of tallow to be delivered *on the safe arrival of the ship Elgin*," and the ship arrives, but with no goods on board, the seller is liable in damages to the buyer, for the contract is to deliver the goods if the ship should arrive, whether the goods were on board or not (j). The distinction between the two classes of cases is this: "Where there is an agreement to deliver to the vendor on a certain condition and the condition (without any fault of the vendor) never comes to pass, it is plain that he will not be liable for a non-delivery. But where the agreement is absolute or conditional on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract" (k).

Sub-sec. (3) : Present sale of future goods.—When by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. Though the seller may *purport* to effect a present sale of future goods, the transaction is not a sale, but an agreement to sell. The reason is that "a man cannot in equity, any more than at law, *assign* what has no existence." But a man can *agree to assign* property which is to come into existence in the future. Such a contract at law creates only a personal obligation to pass the property; it does not create any real right or *jus in rem*. In equity, however, the buyer is in a better position, and such a contract would, when the goods come into existence, give him a good title thereto against all persons excepting anyone who, in the meantime and *bona fide*, may have had the property transferred to him. The lessee of a mill covenants with his landlord that he would assign to the landlord all machinery which might thereafter be brought into the mill. The lessee brings new machinery into the mill. Before any assignment to the landlord

(i) *Boyd v. Siffkin* (1809) 2 Camp. 326.

189.

(j) *Hale v. Rawson* (1858) 27 L. J. C. P. | (k) *Ib.* at p. 191.

is made, a creditor who has obtained a decree against the lessee attaches the new machinery in execution of the decree. The landlord is entitled to the new machinery as equitable assignee and the attachment should be raised. It was so held in *Holroyd v. Marshall* (l) which is the leading case on assignment of after-acquired property.

✓ 7. Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before making of contract.

Specific goods perishing before making of contract.—This section is confined to the case of specific goods. (Specific goods mean goods identified and agreed upon at the time a contract of sale is made [s. 2 (14)]^D The section says that if the goods without the knowledge of the seller have perished *at the time when the contract was made*, the contract is void. The section is founded on the rule that where both the parties to a contract are under a mistake as to a matter of fact essential to the contract, the contract is void ; see Contract Act, sec. 20.

Illustrations.

(a) *A* agrees to sell to *B* a *specific* cargo of goods, supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The contract is void.

(b) *A* agrees to buy from *B* a *certain* horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The contract is void.

Unascertained goods perishing before making of contract of sale.—This section, as stated above, applies only to specific goods. It does not apply to unascertained goods. *A* agrees to sell to *B* 50 bales of Bengal cotton out of 3,000 bales in his godown. The godown had, at the time of the contract, been destroyed by fire unknown to *A*. Here the sale is *not of specific goods*, but of a certain quantity of unascertained goods. The contract is not void, and *A* must procure 50 bales of Bengal cotton elsewhere or pay damages for the breach.

Where goods have become damaged.—The section also says that if the goods without the knowledge of the seller have become so damaged as no longer to answer to their description in the contract, the contract is void. *A* agrees to sell to *B* a specific cargo of corn while at sea. It turns out that,

(l) (1862) 10 H. L. C. 191. See also *Collyer v. Isaacs* (1881) 19 Ch. D.

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before the day of the bargain, the ship had stranded and the corn had been so damaged *as not to answer to its description* in the contract. The contract is void (m). But if the goods, though damaged, answer to the description, the buyer must, apart from the warranty express or implied, take the risk as to their quality and condition and must pay the price. The contract is not void in such a case (n). See in this connection sec. 62 below.

Where part of the goods have perished.—This section applies where the contract is one and indivisible and part of the goods have perished at the time when the contract was made. Thus if A agrees to sell to B a parcel of 700 bags of groundnuts lying at a particular place, and at the date of the contract there were not 700 bags in the parcel but only 591 bags, the remaining 109 bags having been abstracted by a third party before the date of the contract without the knowledge of the seller, the contract is void under this section. A contract for a parcel of 700 bags is something quite different from a contract for 591 bags (o).

✓ 8. Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Goods perishing before sale but after agreement to sell.

Goods perishing before sale but after agreement to sell.—Sec. 7 relates to the case where the goods have perished, etc., *at the time when the contract was made*. The present section deals with the case where the goods perish, etc., *after the agreement to sell is made and before the risk passes to the buyer*. In such a case the section says the agreement is avoided. The rule is based on the ground of impossibility of performance. See Contract Act, sec. 56.

As regards risk, the general rule is that the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. (S. 26).

Unascertained goods.—This section, like sec. 7, applies only to the sale of specific goods. If the sale is of a certain quantity of unascertained goods, the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver. See note to sec. 7, "Unascertained goods perishing before making of contract."

(m) *Couturier v. Hastie* (1856) 5 H. L. C. 673.

(n) *Barr v. Gibson* (1838) 3 M. & W. 390.

(o) *Barrow, Lane & Ballard, Ltd. v. Philip Philips & Co.* [1929] 1 K. B. 574.

*The Price.*Ss.
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✓ 9. (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

Ascertainment of price.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Earnest.—It is not unusual in contracts of sale to provide that the buyer should pay part of the price in advance as security for the due performance of the contract by him. The money so paid is called earnest or deposit. If the purchase is carried out, the deposit goes against the purchase-money. But if the sale goes off *through the buyer's fault*, the deposit, unless otherwise agreed, is forfeited to the seller (p).

✓ 10. (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided :

Agreement to sell at valuation.

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Agreement to sell at valuation.—*A* agrees to sell goods to *B* at a price to be fixed by *C*. If *C* refuses to value the goods and fix the price, the agreement is avoided. If *C* is willing to value the goods, but is prevented from making the valuation by the wrongful act or default of *A* or *B*, the party in fault may become liable in damages to the party not in fault. For the definition of "fault," see sec. 2 (5) above.

(p) *Howe v. Smith* (1884) 27 Ch. D. 87 ; *Soper v. Arnold* (1887) 14 App. Cas. 429.

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Conditions and Warranties.

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

✓ **Stipulations as to time.**—The general rule of law as contained in sec. 55 of the Contract Act is that where a party to a contract promises to do a certain thing at or before a specified time and fails to do it at or before the specified time, the contract *becomes voidable* at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.) But if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time, and the remedy of the promisee is in *damages* for any loss occasioned to him by the failure.

✓ (In the case of contracts for the sale of *immovable* property, time is not, unless a contrary intention appears, of the essence of the contract.) Thus if *A* agrees to sell and *B* agrees to buy a house belonging to *A*, and the contract provides that the sale should be completed on or before a specified day, time is not of the essence of the contract. The result is that neither party is entitled to avoid the contract merely because of the failure of the other to perform his part of the contract at or before the specified time, and the Court may at the suit of either party enforce specific performance of the contract if such party offered to perform his part of the contract within a reasonable time after the expiry of the period fixed by the contract (*q*).

The law, however, is different as regards contracts for the sale of *goods*. In mercantile contracts, stipulations as to time, *except as regards time of payment*, are usually of the essence of the contract. Therefore, if time is specified for delivery of goods or for doing any other act, delivery must be made or the act done at the specified time. Thus if *A* agrees to sell and deliver goods to *B* on a certain day, he must deliver them on that day. If he fails to do so, *B* is entitled to put an end to the contract. The leading English case on the subject is *Reuter v. Sala* (*r*). In that case *A* agreed to sell to *B* 25 tons of pepper of October shipment, and to declare the name of the vessel and other particulars to *B* within 60 days of the bill of lading. Only 20 tons were declared within the 60 days, the remaining 5 tons having been declared subsequently. *B* refused to accept the goods, and it was held that he was justified in doing so.

(*q*) *Jamshed v. Burjorji* (1916) 43 I. A. 26, 40 Bom. 289. | (*r*) (1879) 48 L. J. C. P. 492.

As regards the relative obligations of the seller to deliver and of the buyer to pay the price, see sec. 32 below [Payment and delivery are concurrent conditions].

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Condition
warranty.

a n d

✓ 12. (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

Condition and warranty.—The obligations on the seller under a contract of sale are not all of equal importance. There are some which go so directly to the root or substance of the contract, or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. Such obligations are called conditions. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the root or substance of the contract. These are called warranties (s).

Remedies of buyer arising from breach of condition and breach of warranty.—The remedies of the buyer arising from a breach by the seller of a condition and a breach of a warranty are different. In both cases the buyer is entitled to damages. But in the case of a breach of a condition he has the option of another remedy, namely, of treating the contract as repudiated and rejecting the goods altogether, provided he has not accepted the goods or any part thereof, or, in the case of specific goods, the property has not passed to him (see s. 13).

✓ Express conditions and warranties.—Conditions and warranties are either express or they are implied by law. Conditions and warranties implied by law are enumerated in secs. 14 to 17 below.

(s) *Wallis v. Pratt* [1910] 2 K. B. 1003, 1012.

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As regards *express* conditions and warranties, no particular form of words is necessary to create a condition or warranty. The question in such a case is what the parties *intended*, whether they intended that a term or stipulation should operate as a condition entitling the buyer to treat the contract as repudiated and to reject the goods if the stipulation is not fulfilled, or that it should operate as a mere collateral contract or warranty for the breach of which the remedy of the buyer is an action for damages. Where the contract is in writing, and it is not ambiguous, it is conclusive evidence of their intention, and to put a meaning on the contract is simply a question of *construction* for the Court. If the contract is ambiguous, so that the intention cannot be read on the face of the document, the Court may look at the surrounding facts and circumstances to determine what the parties intended (t). A stipulation may be a condition, though called a warranty in the contract. It is important to note that an express condition or warranty does not negative a condition or warranty implied by the Act unless inconsistent therewith [s. 16 (4)].

Commendation by seller of his goods.—Mere words of commendation used by a seller in reference to his wares do not constitute a warranty in respect of those wares (u).

✓13. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

When condition to be treated as warranty.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Sub-sec. (1): Waiver of condition.—Where a contract is subject to a condition to be fulfilled by the seller, the buyer may waive the condition. If he does so waive, he cannot afterwards insist on its fulfilment.

(t) See *Behn v. Burness* (1863) 32 L.J. Q. B. 304. See also Indian Evidence Act, 1872, ss. 91

and 92.

(u) *Bannerman v. White* (1861) 31 L.J. C.P. 28.

Sub-sec. (1): Election by buyer to treat breach of condition as breach of warranty.—Where a contract of sale is subject to any condition to be fulfilled by the seller, and the seller commits a breach of the condition, the buyer may treat the contract as repudiated and refuse to accept the goods. He is not, however, bound to do so. He may accept the goods and, treating the breach of the condition as a breach merely of a warranty, set up against the seller the breach of the warranty in diminution of the price, or he may sue the seller for damages for breach of warranty. See note to sec. 12 above “Remedies of buyer arising from breach of condition and breach of warranty.” See also sec. 56 below.

Sub-sec. (2): Where goods accepted or property in goods has passed.—The substance of the rule contained in this sub-section is that the right which the buyer has to treat the contract as repudiated on the breach of a condition by the seller cannot be exercised if he *has accepted the goods*, or, in the case of specific goods, *the property in the goods has passed to him*. In both these cases, the remedy of the buyer is confined to damages.

This gives rise to the following questions :—

- (1) When is the buyer deemed to have accepted the goods ?
- (2) When does the property in the goods pass to the buyer ?

The buyer is *deemed to have accepted the goods* when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, *e.g.*, where he uses them, or where, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them ; see sec. 42 (acceptance). Where goods are sold subject to a “condition” to be fulfilled by the seller, and the buyer *has accepted the goods*, he is not entitled to reject the goods, unless there is a term of the contract to that effect. He can only treat the breach of the condition as a breach of warranty and claim damages. This is so even in the case of specific goods the property in which has passed to the buyer. The rules as to the passing of property are laid down in Chapter III. Instances of both these classes of cases are given in the notes under sec. 16 below [implied conditions as to quality or fitness].

Sub-sec. (3).—See Contract Act, sec. 56 [Agreement to do impossible act, etc.], and secs. 62 to 67 [Contracts which need not be performed].

✓ **14.** In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is—

Implied undertaking
as to title, etc.

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he

✓ S. 14

will have a right to sell the goods at the time when the property is to pass ;

- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Implied conditions and warranties.—As has already been stated, conditions and warranties are either express or they are implied by law. See notes to sec. 12, “Express conditions and warranties.” Secs. 14 to 17 deal with implied conditions and warranties.

Implied condition as to title.—In every contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods. Thus if *A* sells to *B* tins of condensed milk labelled “Nissly brand,” and this is proved to be an infringement of *N.* Company’s trade mark, it is a breach of the implied condition that *A* had the right to sell. *B* may therefore reject the goods, or take off the labels, and claim damages for the reduced sale value (*v*).

If the seller has no title, and the buyer has to give up the goods to the real owner, he is entitled to a return of the price. The circumstances, however, of the contract may be such as to show that there was no condition as to title. Thus where goods seized under a distress warrant are sold by public auction, and the buyer knows that they are sold under a distress, the auctioneer is not liable if the warrant turns out to be invalid and the buyer has to return the goods. The buyer in such a case takes the risk of the warrant turning out invalid (*w*).

Implied warranty of quiet possession.—In every contract of sale, unless the circumstances of the contract are such as show a different condition, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. If there is a breach of this warranty, the seller is liable to the buyer in damages.

Implied warranty that goods are free from encumbrances.—There is also an implied warranty on the part of the seller that the goods are free from any charge or encumbrance. If the goods are afterwards found to be subject to a charge in favour of a third party, the seller is liable to the buyer in damages.

(*v*) *Niblett v. Confectioners' Materials Co.* [1921] 3 K.B. 287. | (*w*) *Payne v. Elsdon* (1900) 17 T.L.R. 161.

✓ 15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. S. 15

Implied condition in sales by description.—In the case of a sale of goods by description there is an implied condition that the goods shall correspond with the description. It is a condition which goes to the root of the contract and the breach of it entitles the buyer to reject the goods. "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it" (x).

A sale is by description where the class or kind to which the goods belong is specified in the contract, *e.g.*, Fair Bengal Cotton, Java sugar; also, where they are described by the qualities or characteristics which they must possess, as where wood is sold as being of specified dimensions or sugar or rice or any other commodity is sold as being of a certain shipment. In all these cases the goods tendered must correspond with the description. If they do not, the buyer may reject the goods, or he may at his option accept them and claim damages. See notes under sec. 13 (2) above.

Illustrations.

(a) *A*, at Calcutta, sells to *B* twelve bags of "waste silk" then on its way from Murshedabad to Calcutta. There is an implied condition that the silk shall be such as is known in the market as "waste silk." If it is not, *B* is entitled to reject the goods.

✓ (b) *A* agrees to sell to *B* "Calcutta linseed," then on its way from Calcutta to England. Linseed sent to England from Calcutta contains about two or three per cent. of other seeds, while the seed tendered to *B* contains about fifteen per cent., and is *not saleable in the market as Calcutta linseed*. *B* may refuse to accept the goods. But if he accepts them, he can only claim damages as on a breach of warranty (y) [s. 13 (2)].

(c) *A* sells to *B* fifty parcels of sawn laths to be of "about the specification" mentioned in the contract. Thirty-three per cent. of the laths shipped under the contract are not of "about" the specification nor commercially within its meaning. The buyer is entitled to reject the whole consignment (z).

(x) *Bowes v. Shand* (1877) 2 App. Cas. 455, 460.

(y) *Wieler v. Schilizzi* (1856) 25 L.J.C. .

p. 89.
(z) *Vigers v. Sanderson* [1901] 1 K.B. 608.

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(d) *A* agrees to sell to *B* rice "to be shipped at Madras during the months of March and/or April, about 300 tons, per *Rajah of Cochin*." Part of the cargo is shipped in February and part in March. *B* may refuse to accept any of the rice, the goods not corresponding with the description (a).

✓(e) *A* agrees to sell and *B* agrees to buy a reaping machine which *B* has never seen and which is represented by *A* to have been new the previous year and used to cut only fifty or sixty acres. After delivery *B* finds that the machine does not correspond with *A*'s representations. *B* is entitled to return the machine (b). The mere fact that *B* has taken delivery does not constitute acceptance [see s. 42]. In the case last cited Channell, J., said in the course of his judgment: "The term *sale of goods by description* must apply to all cases where the purchaser has not seen the goods, but is relying on the description only." But, as stated by Chalmers (c), it may apply even where he has seen the goods if the deviation of the goods from the description is not apparent.

The implied condition in sales by description, namely, that the goods shall correspond with the description, is quite distinct from the implied condition as to quality dealt with in the next section. Thus a contract may contain terms whereby the seller may guard himself from any responsibility as to *quality*; yet if the sale is by description he is bound to supply goods which correspond with the *description* (d). Again, a contract may contain a term that if the goods should turn out inferior in *quality* the buyer should not be entitled to reject them but should be entitled only to a fair allowance for inferiority in quality, or it may contain a term that should any dispute arise between the buyer and the seller, it should be referred to arbitration; neither of these terms relieves the seller from the obligation to supply goods corresponding with the *description* (e).

Sale by sample as well as description.—If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. The fundamental condition is that the goods must correspond with the description. The stipulation that the goods shall be according to the sample affects the *quality* and not the *nature* of the article (f). Therefore, though the bulk may agree with the sample, yet if the bulk does not correspond with the description in the contract, the condition is broken and the buyer is entitled to reject the goods.

(a) *Bowes v. Shand* (1877) 2 App. Cas. 455.

(b) *Varley v. Whipp* [1900] 1 Q.B. 513.

(c) *Sale of Goods*, 10th ed., p. 45.

(d) *Wallis v. Pratt* [1911] A.C. 394.

(e) *Azemar v. Casella* (1867) 30 L.J.C. p. 124; *Vigers v. Sanderson* [1901] 1 K.B. 608.

(f) *Nichol v. Godts* (1854) 23 L.J. Ex. 314.

*Illustrations.*Sa.
15, 16

(a) *A* buys by sample, 100 bales of "Fair Bengal" cotton, and after having inspected the bulk, the cotton proves not to be such as is known in the market as "Fair Bengal." *A* may reject the goods when delivered to him.

✓(b) *A* sells to *B* five parcels of "foreign refined rape oil warranted only equal to samples." The samples consist of rape oil mixed with hemp oil. The oil tendered corresponds with the samples, but it is not such as is known in the market as "foreign refined rape oil." *B* may reject the goods. "The warranty affects only the *quality*, but not the *nature* of the article itself" (g).

✓16. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(g) *Nichol v. Gods* (1854) 23 L.J. Ex. 314.

S. 16

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

✓ **Caveat emptor.**—The next question to consider is whether if the goods correspond with the description, but are of inferior quality or damaged or unfit for some particular purpose, the buyer is entitled to reject them or whether he takes the risk as to their quality and condition.

The general rule of the common law in regard to quality or fitness under a contract of sale is that except in cases of fraud, the buyer purchases at his own risk unless there has been a condition or warranty. This is expressed by the maxim *caveat emptor* which means that the buyer must take care. Thus if *A* sells a horse to *B*, and it turns out that the horse had, at the time of the sale, a defect of which *A* was not aware, *A* is not in the absence of fraud responsible for this, and *B* must pay the whole price. He is neither entitled to reject the horse nor to any damages. There is no *implied* warranty of soundness in such a case. *B* could only protect himself by an *express* condition or warranty.

This section begins with an enunciation of the rule involved in the maxim *caveat emptor*. It then proceeds to lay down two exceptions to the rule, one in sub-sec. (1) and the other in sub-sec. (2). It says that there is no implied warranty or condition as to the quality (which includes state or condition) or fitness for any particular purpose of the goods supplied under a contract of sale *except* in two cases. In the first case [sub-sec. (1)], there is an implied condition that the goods are *reasonably fit for the purpose for which they are required*. In the second case [sub-sec. (2)], there is an implied warranty that the goods are of *merchantable quality*. In all other cases the buyer takes the risk as to the quality, condition and fitness of the goods. If he wants to protect himself in these cases, he may do so by an *express* warranty or condition.

✓ **Sub-sec. (1): First exception: Implied condition as to quality or fitness.**—The first class of cases is where—

- (i) the buyer makes known to the seller the particular purpose for which the goods are required ;
- (ii) the buyer relies on the seller's skill or judgment ; and
- (iii) the goods are of a description dealt in by the seller, whether he be the manufacturer or not.

In such cases there is an implied condition that the goods sold are reasonably fit for the purpose for which they are bought. The three conditions mentioned above must co-exist. They may be considered in order.

(i) Firstly, the particular purpose for which the goods are required must be made known to the seller. The purpose may be made known expressly or by implication. It should be made known expressly if the goods may be used for a multitude of purposes, for then the buyer should inform the seller of the particular purpose for which he requires the goods (*h*). But the purpose may be made known by implication and without any express notification. This implication may arise from the very nature of the goods. The description of the goods may be such as to show that they are required for a particular purpose. If a fishmonger sells oysters he must know that they are required for the particular purpose of being eaten (*i*). If a retail dealer in woollen goods sells underpants he must know that they are required for the particular purpose of being worn next the skin (*j*). The seller being a dealer in the goods sold there is a presumption that the buyer relies on his skill or judgment. The seller is therefore liable if the oysters are poisonous or if the underpants cause skin disease.

Illustrations.

(a) *A* goes to a chemist's shop and asks for a hot-water bottle. He is shown a bottle which the chemist says will not stand boiling water, but is meant for hot water. *A* buys the bottle. After a few days, while using it, it bursts and injures *A*. It is found that the bottle was not fit for use as a hot-water bottle. This is a sale of an article required for the purpose of holding hot water, and it is a "particular purpose" within the meaning of subsec. (1). There is therefore an implied condition that the bottle is fit for that purpose, and the seller is liable in damages for a breach of warranty (*k*).

(b) *A* goes to a milk dealer and buys milk for family use. At the time of sale the milk dealer gives *A* a printed statement that the milk was free from the germs of disease. The milk supplied contains typhoid germs, in consequence whereof *A*'s wife is infected and dies. Here the purpose for which the milk was supplied was sufficiently made known by the buyer to the seller by its description. There was therefore an implied condition that the milk was reasonably fit for human consumption. The milk, not being so fit, the milk dealer is liable in damages for a breach of warranty (*l*).

(ii) Secondly, the buyer must have relied on the seller's skill or judgment. Where the special purpose for which the goods are ordered is disclosed to the seller, and the order is accepted in the terms in which it is given, such an

(*h*) *Priest v. Last* [1903] 2 K.B. 148;
In re Andrew Yule & Co. (1932)
 59 Cal. 928, 140 I.C. 877, ('32)
 A.C. 879.
 (*i*) *Wallis v. Russell* [1902] K.B.D.
 (Ir.) 583.

(*j*) *Grant v. Australian Knitting Mills*
 (1936) 70 M.L.J. 513, 159 I.C.
 667, ('36) A.P.C. 34.
 (*k*) *Priest v. Last* [1903] 2 K.B. 148.
 (*l*) *Frost v. Aylesbury Dairy Co.* [1905]
 1 K.B. 608.

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acceptance is sufficient to show that the buyer has relied on the seller's skill and judgment without any further evidence on the point (m). The special purpose may be disclosed by implication arising out of the description of the goods sold, for they may be such as can only be required for one particular purpose. In such cases the buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment (n). It is obvious that if the buyer himself selects the articles, there is no implied condition as to fitness (o). The following passage from Benjamin on Sale, 7th ed., pp. 662, 663, has received judicial approval: "Where it is part of the contract that goods shall be made according to a certain plan or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated, the only liability then of the manufacturer is to execute the work according to the plan, etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials, in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose" (p).

(iii) Lastly, the goods must be of a description which it is in the course of the seller's business to supply, as where bread is bought from a baker, milk from a milk dealer, coal from a dealer in coal, and copper for sheathing vessels from a copper manufacturer. There is no implied condition if the goods are not of a description dealt in by the seller.

Sale of article under patent or trade name.—In the case of a contract for the sale of a *specified* article under its *patent or other trade name*, there is no implied condition for its fitness for any particular purpose. The buyer in such a case defines by his order the particular article to be supplied, and the contract is performed if the seller supplies that article.

Illustrations.

(a) *B* writes to *A*, the owner of a patent invention for cleaning cotton, "send me your *patent* cotton-cleaning machine to clean the cotton at my factory." *A* sends the machine according to order. There is no implied warranty or condition on the part of *A* that the machine is fit for the particular purpose of cleaning the cotton at *B*'s factory.

(b) *B* writes to *A*, "send me your *patent* hopper and apparatus to fit up my brewing copper with your smoke consuming furnace." *A* sends the machine according to order. There is no implied warranty or condition on the part of *A* that the furnace supplied should be fit for the purpose of

(m) *Manchester Liners, Ltd. v. Rea, Ltd.*
[1922] 2 A.C. 74.

(n) *Grant v. Australian Knitting Mills*
(1936) 70 M.L.J. 513, 159 I.C.
687, ('36) A.P.C. 34.

(o) *Brown v. Edgington* (1841) 2 M. &
G. 279.

(p) *Cammell Laird & Co. v. Manganese
Bronze & Brass Co.* (1933) 2
K.B. 141.

a brewery. *B* having defined by the order the particular machine to be supplied, *A* has performed his part of the contract by supplying that machine (*g*).

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(c) *B* buys a cargo of *Cyfarth Merthyr* coal for the particular purpose of bunkering steamers. This is a contract for the sale of coal under a particular description known in the coal trade and not a contract for the sale of a specified article under its patent or trade name. The proviso to sub-sec. (1) does not therefore apply, and there is an implied condition that the coal is reasonably fit for bunkering (*r*).

The mere fact, however, that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily bring the case within the proviso, so as to exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular named purpose, he does not buy it "under its trade name" within the meaning of the proviso, and if the Court is satisfied upon the facts that the buyer relied on the seller's skill and judgment, the proviso does not apply. *B* goes to *A*, a motor car dealer, and asks for a comfortable car which is suitable for touring purposes. *A* says that a "Bugatti car," a type of car in which he specialized, will meet those requirements, and shows him a specimen, *B* then gives *A* an order for "an eight cylinder Bugatti car." An eight cylinder Bugatti car is delivered to *B* pursuant to the order, but the car proves to be uncomfortable and unsuited for touring purposes. *B* is entitled to reject the car and to recover back the purchase money (*s*).

Sub-sec. (2) : Second exception : Implied condition as to merchantableness.—The second exception is where—

- (1) goods are bought by description ;
- (2) from a seller who deals in goods of that description, whether he be the manufacturer or not.

There is a sale by description even though the buyer is buying something displayed before him on the counter. A thing is sold by description, though it is specific, so long as it is sold not merely as a specific thing but as a thing corresponding to a description (*t*). If the seller deals in goods of that description there is an implied condition that the goods shall be of merchantable quality. In cases of this class the goods must not only answer to the description in the contract as required by sec. 15, but must also be of

(*g*) *Chanter v. Hopkins* (1838) 4 M. & W. 399.

(*r*) *Gillespie Brothers v. Cheney & Co.* [1896] 2 Q.B. 59.

(*s*) *Baldry v. Marshall* (1925) 2 K.B. 260.

(*t*) *Grant v. Australian Knitting Mills* (1936) 70 M.L.J. 513, 159 L.C. 667, [36] A.P.C. 34.

S. 16 merchantable quality, that is, saleable in the market as goods of that description. The buyer, in other words, is entitled to receive a *saleable* article answering the description in the contract (u). Thus if a person orders motor horns from a manufacturer of horns, and the horns supplied are scratched and damaged owing to bad packing, he is entitled to reject them as unmerchantable (v). But merchantable does not mean merely saleable. In the case of goods purchased from a retailer by description the Privy Council said that the second exception overlaps the first and that merchantable does not mean that a thing is saleable in the market because it looks all right and that it is not merchantable if it has defects unfitting it for its only proper use but not apparent on ordinary examination (w). It is not sufficient that the goods correspond with the description, but if the buyer takes the goods after *examining* them, there is no implied condition as regards defects which such examination ought to have revealed; in such a case the implied condition protects him only from a latent defect. What amounts to an examination is a question of fact in each case. A mere *opportunity* of examining is not sufficient. At the same time if the buyer does examine the goods, though cursorily, and he has had an opportunity of examining the goods more fully if he desired to do so, that amounts to an examination within the meaning of this section (x).

A sale of a bottle of "Stone's Ginger Wine" at a public house is a sale of goods by description, and if the bottle breaks while opening with a corkscrew by reason of a defect in the bottle and injures the buyer, there is a breach of the condition as to merchantable quality, and the buyer is entitled to damages (y). Quality of goods includes their state or condition [s. 2 (12)].

It is important to note that except in the two cases mentioned in this section there is no implied condition or warranty as to the *quality, fitness* or *merchantableness* of goods supplied under a contract of sale. If a case falls within either of the two exceptions, there is an implied condition the breach whereof entitles the buyer to reject the goods or, at his option, to claim damages. If a case does not come within either exception, the maxim *caveat emptor* applies and the buyer takes the risk as to the quality and condition of the goods. If he desires to protect himself, he may do so by an *express* warranty or condition. It is also important to note that neither exception applies unless all the conditions therein are satisfied, there being three conditions in the first exception and two in the second. No serious difficulty should arise if this is carefully borne in mind.

(u) *Randall v Newson* [1877] 2 Q.B.D. 100, 102.

(v) *Jackson v. Rolaz Motor and Cycle Co.* [1910] 2 K.B. 937.

(w) *Grant v. Australian Knitting Mills*

(1936) 70 M.L.J. 513, 159 I.C. 667, ('36) A.P.C. 34.

(x) *Thornett v. Beers* [1919] 1 K.B. 486.

(y) *Morelli v. Fitch and Gibbons* [1928] 2 K.B. 636.

Sale of provisions.—Sec. 111 of the Contract Act provided that on a sale of provisions there was an implied warranty that they were sound. Thus if provisions were sold by a dealer in provisions, there was an implied warranty that they were fit for food. There is no implied warranty or condition under the present section unless (1) the purpose for which they are required is made known to the seller, (2) the buyer relies on the seller's judgment, and (3) the goods are of a description dealt in by the seller. If these conditions are satisfied, there is an implied condition as to fitness under the first exception [sub-sec. (1)] but not otherwise. Thus if a person goes to a milk dealer and asks for milk for family use (z), or goes to a fish monger and asks for fresh crabs for tea (a), and leaves it to the seller to select the provisions, there is an implied condition that the milk or crabs supplied to him are fit for human consumption. In cases such as these the food is sold for the purpose of human consumption and although this is the purpose for which all food is sold it is a "particular purpose", within the meaning of the section, made known to the seller. But it is different if the buyer selects the goods himself. In such a case there is no implied condition as to fitness.

Again, provisions may be bought by *description* in which case the second exception [sub-sec. (2)] may operate. Thus if a person goes into a beer-house which he knows to be tied to certain brewers, and asks for beer, and is supplied with beer contaminated with arsenic, it is a breach of condition under sub-sec. (2) of this section, and the seller is liable to the buyer in damages as for a breach of warranty. But if he *examines* the provisions and then takes them, there is no implied condition except as regards latent defects (b).

Even in a case where there is no implied condition as to the provisions being fit for human consumption the seller may be liable to an action for negligence, as where a bun supplied by a baker contains a stone on which the buyer breaks one of his teeth (c).

Sale of dangerous goods.—Where a person sells goods which he knows to be dangerous, without warning the buyer of the fact, he may be liable in damages for the consequences. This is so apart from any implied condition (d).

Sub-sec. (3): Usage as annexing implied condition as to quality or fitness.—An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. It may similarly be excluded by the usage of trade (e).

- (z) *Frost v. Aylesbury Dairy Co.* [1905] 1 K.B. 608.
 (a) *Wallis v. Russell* [1902] 2 Ir. Rep. 585.
 (b) *Wren v. Holt* [1903] 1 K.B. 610.
 (c) *Chaproniere v. Mason* (1905) 21

T.L.R. 633.

- (d) *Clarke v. Army & Navy Co-operative Society* [1903] 1 K.B. 155.
 (e) See *Cointat v. Myham* (1913) 2 K.B. 220.

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Sub-sec. (4) : Implied warranty or condition may co-exist with express warranty or condition.—Thus an implied condition as to fitness for a particular purpose or as to merchantable quality may be superadded to express conditions contained in the contract.

✓ 17. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Sale by sample.

(2) In the case of contract for sale by sample there is an implied condition—

- (a) that the bulk shall correspond with the sample in quality ;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Sale by sample.—A sale is by sample when there is a *term* in the contract express or implied to that effect. Thus if *A* sells goods to *B* on the term that “the goods shall be equal in quality to the sample,” the sale is a sale by sample and the incidents mentioned in sub-sec. (2) will attach. But if the seller exhibits the sample merely to show the sort of goods he is offering, the sale is not necessarily by sample (*f*). In such a case if the seller shows goods of one quality and delivers goods of another quality, he may be liable for fraud, but the sale is not a sale by sample.

Implied condition on sale by sample.—On a sale of goods by sample there is an implied condition that the bulk is equal in quality to the sample. If the bulk does not correspond with the sample, there is a breach of condition, and the buyer is entitled to reject the goods unless he has accepted them, or, in the case of a contract relating to specific goods, the property in the goods has passed to him, in both of which cases he is entitled to damages only on the footing of a breach of warranty as laid down in sec. 13 (2) above. “Quality” includes the state or condition of goods [s. 2 (12)]. As to sale by sample as well as by description, see sec. 15 above.

Opportunity of comparing bulk with sample.—In a sale by sample the buyer is entitled to have a reasonable opportunity of comparing the bulk with the sample. If such opportunity is not given, the buyer may refuse to take the goods. In a case where *A* contracted to sell by sample two parcels of wheat, one containing 700 bushels and the other 1,400, and

(f) *Hill v. Smith* (1812) 4 Taunt. 520.

he allowed inspection of the smaller parcel but refused inspection of the larger parcel, it was held that the buyer was entitled to refuse to take any of the wheat (g). The right to inspect, however, may be excluded by the express terms of the contract, as where payment is to be made in cash on arrival of the goods "against shipping or railway documents." In such a case the buyer is not entitled to inspect the goods before payment. He is bound to pay on arrival of the goods and production of the documents, although he would still have the right to reject if, on subsequent examination, it was found that the bulk did not correspond with the sample (h). This is always so in the case of contracts on c. i. f. terms; see note, "c.i.f. contract," under sec. 39 below (delivery to carrier).

Where part only of the goods equal to sample.—Where part of the goods is equal to the sample and part inferior to the sample, the buyer may reject the whole, or he may accept the whole and claim damages for the portion which is inferior to the sample. But he cannot retain the part which is equal to the sample and reject the other part, unless the contract is severable.

✓ *Summary of the law relating to implied conditions and warranties.*

I. The breach of a condition gives rise to a claim to treat the contract as repudiated and to *reject the goods* (s. 12).

II. The breach of a warranty gives rise to a claim *merely for damages* (s. 12).

III. The buyer *may waive* a condition to be fulfilled by the seller. After waiver he cannot reject the goods [s. 13 (1)].

IV. The buyer *may elect* to treat the breach of a condition as a breach of a warranty, that is, instead of rejecting them he may accept them and claim damages as if the breach was a breach of a warranty [s. 13 (1)].

V. Even if there is a breach of a condition to be fulfilled by the seller, the buyer cannot reject the goods—

(i) after he has accepted them, or,

(ii) in the case of specific goods, after the property in the goods has passed to the buyer [s. 13 (2)].

Note.—See sec. 42 as to acceptance and secs. 20 to 24 as to passing of property.

VI. An *express warranty* or condition does not negative a warranty or condition *implied by the Act* unless inconsistent therewith [s. 16 (4)].

(g) *Lorymer v. Smith* (1822) 1 B. & C. 1.
(h) *Polenghi v. Dried Milk Co.* (1904)

10 Com. Cas. 42.

Chart B—Conditions.

STIPULATIONS.

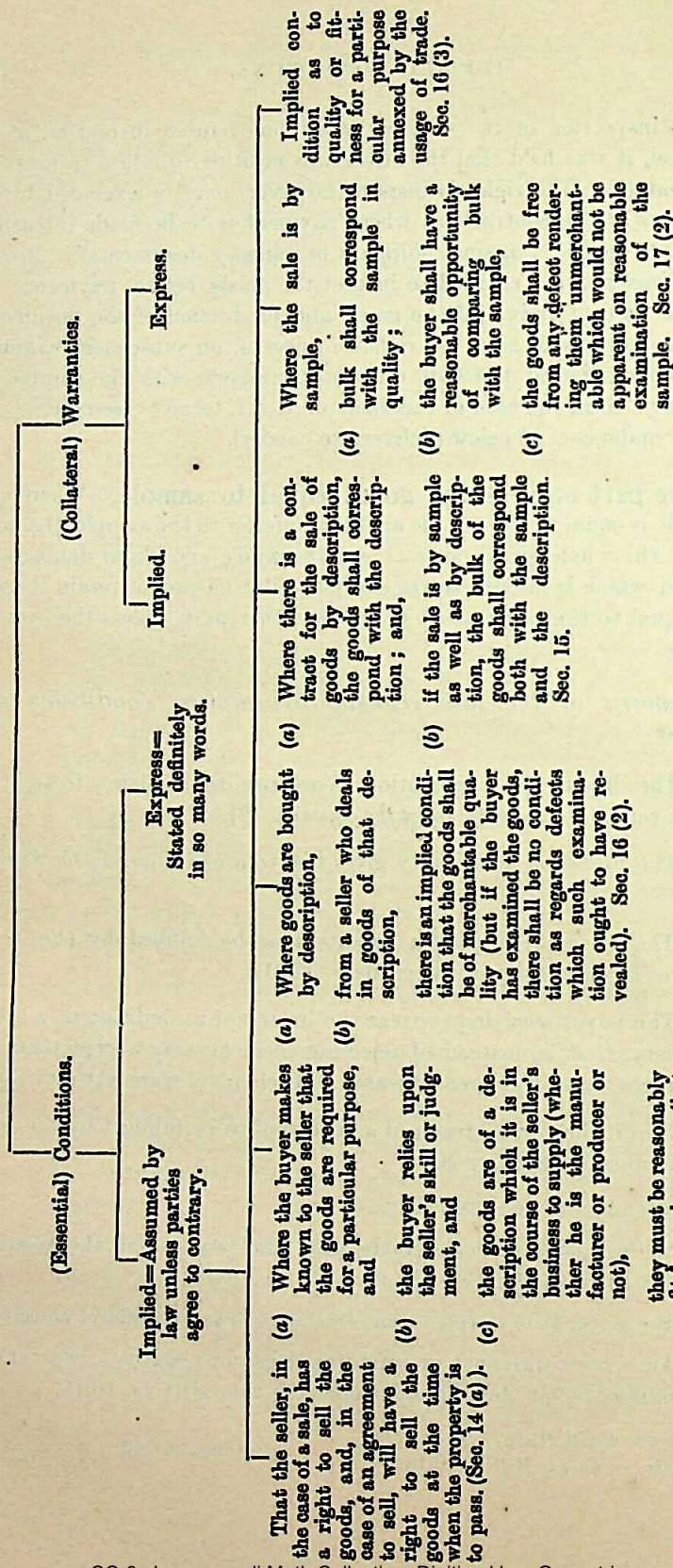
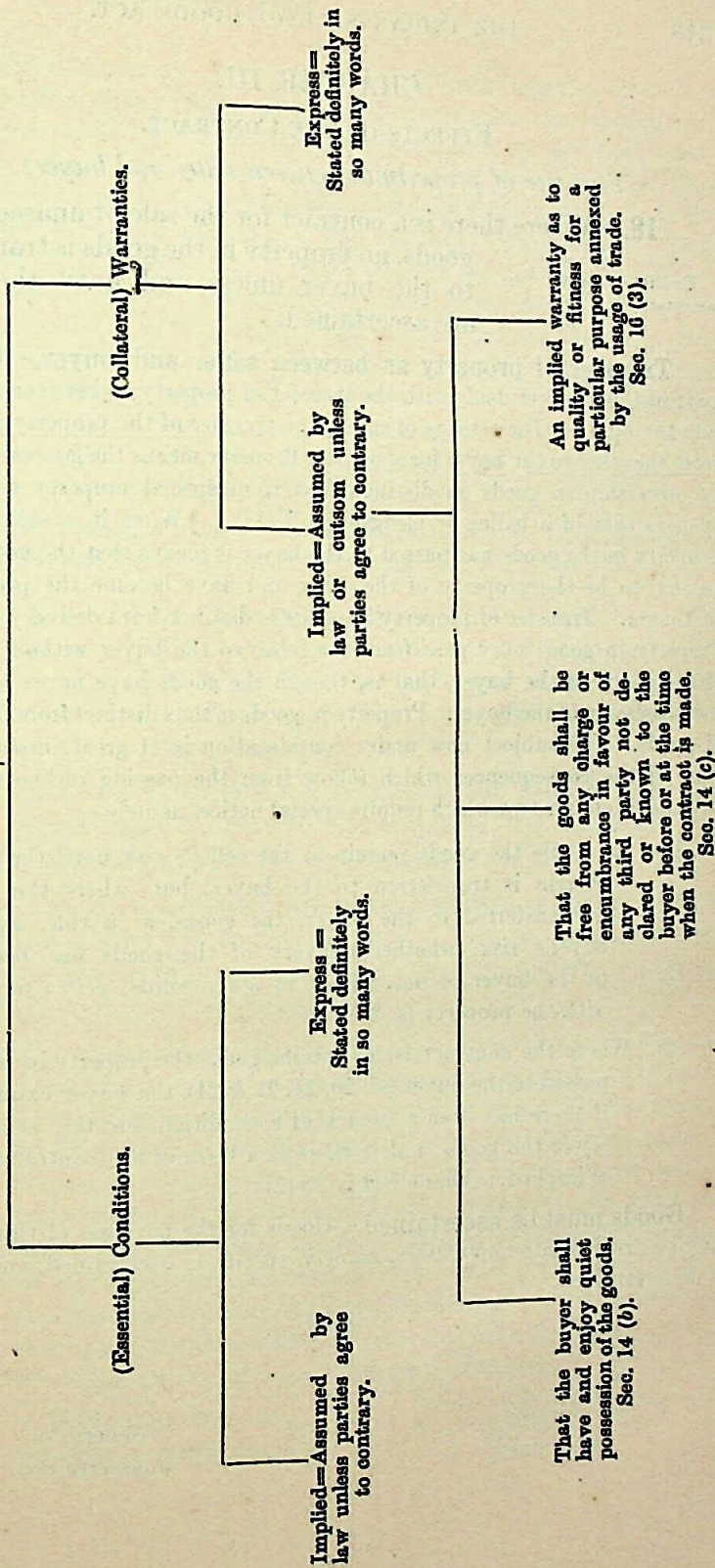


Chart C—Warranties

STIPULATIONS.



CHAPTER III.

EFFECTS OF THE CONTRACT.

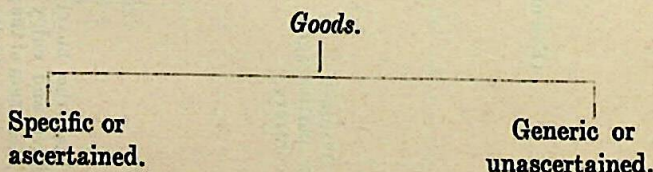
Transfer of property as between seller and buyer.

- S. 18 18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.
- Goods must be ascertained.

✓ **Transfer of property as between seller and buyer.**—The first part of this chapter deals with the transfer of property as between the seller and the buyer. The essence of sale is the transfer of the property in goods from the seller to the buyer for a price. (Property means the general property or ownership in goods as distinguished from special property or interest such as that of a bailee or pledgee [s. 2 (11)].) When it is said that the property in the goods has passed to the buyer it means that the goods have ceased to be the property of the seller and have become the property of the buyer. Transfer of property in goods is distinct from delivery of goods. Property in goods may pass from the seller to the buyer without delivery of the goods to the buyer, that is, though the goods have never come into the possession of the buyer. Property in goods is thus distinct from possession of goods. The subject now under consideration is of great importance in view of the consequences which follow from the passing of the property. Of these there are two which require special notice, namely—

- ✓ (1) As a rule the goods remain at the seller's risk until the property therein is transferred to the buyer, but where the property is transferred to the buyer, the goods, as a rule, are at the buyer's risk, whether delivery of the goods has been made to the buyer or not. (Risk, in other words, *prima facie* passes with the property (s. 26).)
- ✓ (2) Where the contract is for specific goods the property in which has passed to the buyer (ss. 20, 21, 22 & 24), the buyer cannot, even if there has been a breach of a condition on the seller's part reject the goods, unless there is a term of the contract, express or implied, to that effect [s. 13 (2)].

Goods must be ascertained.—Goods for the purposes of this chapter may be divided into two classes, namely, specific or ascertained, and generic or unascertained.



Specific goods mean goods identified and agreed upon *at the time a contract of sale is made*; specific goods, in other words, are ascertained goods. Specific goods must be distinguished from generic or unascertained goods which are defined by description only. The present section provides that where there is a contract for the sale of unascertained goods, no property in the goods passes to the buyer unless and until the goods are ascertained. Thus if *A* agrees to sell to *B* 20 tons of oil of a certain description in his cistern and he has more than 20 tons of that description in his cistern, no property passes to *B* until the 20 tons are separated from the rest and they are appropriated to the contract. The goods are ascertained by appropriation. Until appropriation there is merely an agreement to sell. The agreement to sell becomes a sale when the goods on which the contract is to operate are ascertained (i). The mere fact that the goods are to come out of a specified cistern does not make them *ascertained goods*.

As to the passing of property in specific goods, see secs. 19, 20, 21, 22 and 24. As to the passing of property in unascertained goods, see sec. 23.

19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Property passes when intended to pass.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Property passes when intended to pass.—Sec. 18 says that in the case of a contract for the sale of *unascertained* goods, no property in the goods passes to the buyer unless and until the goods are ascertained. But what if the contract is for the sale of *specific or ascertained* goods? Does the property in the goods pass immediately the contract is made? The answer to this question is afforded by sec. 19. It says that the property passes when the parties to the contract intended it to pass. There is no difficulty when the parties have expressed their intention in express and clear terms. When, however, they have not done so, the intention must be gathered from the whole agreement, and the Courts have for this purpose adopted some rules of construction which are set out in the subsequent sections (j).

(i) *White v. Wilks* (1813) 5 Taunt. 176.

(j) *Hoe Kim Seing v. Maung Ba Chit*

(1935) 62 I.A. 242, 14 Rang. 1, 37
Bom. L.R. 866, 157 I.C. 891, ('35)
A.P.C. 182.

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✓ 20. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Unconditional contract of sale of specific goods in a deliverable state.—This section applies to the case of specific goods—

- (1) where the contract is unconditional, that is, not subject to any condition to be fulfilled by the parties ; and
- (2) where the goods are in a deliverable state, that is, they are in such a state that the buyer would under the contract be bound to take delivery of them.

In such a case the section says the property in the goods passes to the buyer *when the contract is made*, whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. This is the case of a sale as distinguished from an agreement to sell.

Illustrations.

(a) *B* offers *A* for his horse Rs. 1,000, the horse to be delivered to *B* on a stated day, and the price to be paid on another stated day. *A* accepts the offer. The horse becomes *B*'s property when the contract is made, that is, as soon as the offer is accepted.

(b) *B* offers *A* for his horse Rs. 1,000 on a month's credit. *A* accepts the offer. The horse becomes *B*'s property as soon as the offer is accepted.

(c) *B* on the 1st January, offers to *A* for a quantity of rice Rs. 2,000, to be paid on the 1st March following, the rice not to be taken away till paid for. *A* accepts the offer. The rice becomes *B*'s property as soon as the offer is accepted, and the goods are at *B*'s risk from the moment of the acceptance of the offer.

✓ 21. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Contract of sale of specific goods to be put into a deliverable state.—Where the goods have to be put into a deliverable state, the property and the risk do not pass to the buyer until the seller has put them into that

state and the buyer has notice thereof. The words "and the buyer has notice thereof" are intended to prevent the hardship which might result in the risk being transferred to the buyer without notice.

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Illustration.

✓ *A*, a ship-builder, contracts to sell to *B*, for a stated price, a vessel which is lying in *A*'s yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel and the risk do not pass to *B* until the vessel has been rigged and fitted and notice thereof is given to *B*.

Goods in process of manufacture.—Where there is a contract for the sale of a thing which has yet to be made or finished, the property in the thing does not pass to the buyer until it is delivered in a finished state, or until it is ready for delivery and is approved by the buyer in that state; and this is so even where the thing is to be paid for by stated instalments as the work progresses. But the contract may provide that the property shall pass from time to time as the instalments are paid. *B* orders *A*, a barge-builder, to make him a barge. The property in the barge does not pass to *B* until it is delivered to *B* in a finished state, or until it is ready for delivery and is approved by *B* in that state. It is immaterial that the price is made payable by instalments and *B* pays the instalments regularly (*k*).

✓ **22.** Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.

Contract of sale of specific goods in a deliverable state when the seller has to do anything thereto in order to ascertain the price.—Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, *e.g.*, weighing them or measuring them, the property does not pass until this has been done and the buyer has notice thereof.

Illustration.

✓ *A*, the owner of a stack of bark, contracts to sell it to *B*, weigh and deliver it, at Rs. 100 per ton. *B* agrees to take and pay for it on a certain day. Part is weighed and delivered to *B*. The ownership of the residue is not transferred to *B* until it has been weighed pursuant to the contract and the notice thereof is given to *B*.

(*k*) *Seath v. Moore* (1886) 11 App. Cas. 350, 370, 380.

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The section does not apply when the thing which has to be done is to be done by the buyer and not the seller (l).

Illustration.

A contracts to sell a heap of clay to B at a certain price per ton. B (the buyer) is, by the contract, to load the clay in his own carts and to weigh each load at a certain weighing machine, which his carts must pass on their way from A's ground to B's place of deposit. Here nothing more remains to be done by the seller. The sale is complete and the ownership of the heap of clay is transferred at once to B.

✓23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Contract of sale of unascertained goods and appropriation.—It has been seen that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (s. 18). Until that is done there are no goods on which the contract can operate. How then are the goods to be ascertained ?

At the outset it is to be remembered that when the contract is for the sale of unascertained goods, the goods can be defined by description only, e.g., Fair Bengal cotton, Calcutta silk, Java sugar. Suppose that the contract is for the sale of 100 bales of Fair Bengal cotton out of 5,000 bales of cotton of different descriptions lying in the seller's warehouse. In such a case the goods to be selected by the seller must correspond with the description in the contract, that is, the cotton must be Fair Bengal cotton. Assuming that the seller has selected 100 bales of Fair Bengal cotton, it is not sufficient for passing the property in the bales to the buyer that he has set

(l) *Hoe Kim Seing v. Maung Ba Chit* |
(1935) 62 I. A. 242, 14 Rang. 1, 37

Bom. L.R. 366, 157 I.C. 891, ('35)
A.P.C. 182.

aside the 100 bales in his own warehouse. Such an act indicates merely an *intention* to appropriate the bales to the contract. The matter resting in intention only, the seller is at liberty to change his mind and deliver the goods to another buyer. What is required for the transfer of the property to the buyer is an unconditional appropriation of the bales to the contract. This is usually done by the seller giving notice to the buyer that the bales are ready for delivery and the buyer assenting to the appropriation by saying that he will take delivery thereof. It is at this stage that goods are ascertained and unconditionally appropriated by the seller to the contract with the assent of the buyer. The buyer becomes the owner of the goods, and the seller cannot deliver them to another person for he is no longer the owner of the goods. The appropriation may also be made by the buyer and assented to by the seller. "The selection of the goods by the one party and the adoption of that act by the other, connects that which before was a mere agreement to sell into an actual sale, and the property thereby passes" (*m*).

Illustration.

✓ *A*, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell to *B* 20 hogsheads of it. After the contract, *A* fills 20 hogsheads with the sugar, and gives notice to *B* that the hogsheads are ready and requires him to take them away. *B* says he will take them as soon as he can. By this appropriation by *A*, and assent by *B*, the property in the sugar passes to *B* (*n*).

Authority to select and appropriate.—A contract for the sale of unascertained goods may provide that the buyer shall have the authority to select and appropriate the goods to the contract or that the right to select and appropriate shall be in the seller. If the buyer has the right to select, and he selects the goods out of the bulk, no difficulty arises. When he has done so, the goods are ascertained and the property in the goods passes to him. The difficulty arises when the seller makes the selection pursuant to an authority derived from the buyer, for the question may then arise whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or whether they show an irrevocable exercise of a right of election (*o*). In the former case, the seller may change his mind and send the goods to another buyer; in the latter he cannot. When, then, is the seller entitled to select and when does the appropriation by him become final? The general rule is that where by the terms of the contract the seller is to *dispatch the goods, or to do any act with reference to the goods which cannot be done until they are appropriated to the buyer*, the seller has a right to select any goods answering to the description in the contract: and the property is

(*m*) *Rhodes v. Thwaites* (1827) 6 B. & C. 388, per Holroyd, J.
(*n*) *Rhodes v. Thwaites* (1827) 6 B. & C.

388.
(*o*) Chalmers' Sale of Goods Act, 10th ed., p. 61.

- S. 23 transferred the moment the dispatch or other act has commenced, for then an appropriation is made finally and the election irrevocably determined (*p*) [ills. (a) and (b)]. But if there is no authority to dispatch the goods or to do anything to them which cannot be done till the goods are appropriated, the appropriation is not complete until the buyer has assented to it [ill. (c)]. The matter is thus put by Blackburn in his work on Contract of Sale (*q*):—
 “But the difficulty arises when the original agreement does not ascertain the specific goods (*i.e.* the agreement is for the sale of unascertained goods), and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement; or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.”

Illustrations.

✓(a) *A* sends a written order to *B*, a manufacturer, for a quantity of hardware, to be *dispatched* on insurance being effected. *B*, in pursuance of the order, packs up a cask of hardware and sends it to his shipping agents. The cask is marked with the buyer's initials and insured on his account. The property in the goods passes to *A* from the moment the goods leave *B*'s warehouse. *B* cannot thereafter change his mind and deliver the goods to another buyer (*r*).

(b) *B* agrees with *A* to purchase of him, at a stated price to be paid on a fixed day, 50 maunds of rice out of a larger quantity in *A*'s granary. It is agreed that *B* shall send sacks for the rice, and that *A* shall put the rice into them. *B* does so, and *A* puts 50 maunds of rice into the sacks. The property in the goods passes to *B* from the moment *A* commences to put the rice into *B*'s sacks. *A* cannot thereafter change his mind and deliver the goods to another buyer (*s*).

(c) *B* orders two machines to be made by *A* according to a certain design. *A* makes the machines, packs them in boxes, and writes to *B* to say that they are ready and inquires by what conveyance they are to be sent. Before *B* replies to the letter, *A* becomes insolvent. *B* claims the machines as his property. The Official Assignee claims them as property still belonging to *A*. The Official Assignee is entitled to the machines. Here *A* had no authority from *B* to *dispatch* the machines as in ill. (a) nor had he any authority to do any act with reference to them which could not be done until the goods were appropriated as in ill. (b). Therefore, *B*'s assent to the appropriation was necessary before the property could pass to him. No such

(*p*) Blackburn on Sale, 3rd ed., p. 138.

(*q*) *Ibid*, p. 137.

(*r*) *Fragans v. Long* (1825) 4 B. & C. 219.

(*s*) *Aldridge v. Johnson* (1857) 26 L.J. Q.B. 296.

assent having been given, the property in the machines remained in *A*, though he had intended them for *B* and informed him of that intention. For all that had been done, *A* might still have supplied *B* with any other two machines answering the description in the contract (*t*).

Sub-sec. (2): Delivery to buyer.—Where, in pursuance of the contract, the seller delivers the goods to the buyer, the *delivery* operates as an unconditional appropriation by the seller, and the property passes to the buyer at the moment of delivery.

Sub-sec. (2): Delivery to carrier.—The commonest case of appropriating goods to the contract (i.e. a contract for the sale of *unascertained* goods) is where, *in pursuance of the contract*, the seller delivers goods to a carrier for the purpose of transmission to the buyer. In such a case the *delivery* operates as an unconditional appropriation by the seller, and the property passes to the buyer at the moment of delivery. Thus if a tradesman orders goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier it operates as a delivery to the buyer and the property in the goods passes to the buyer (*u*). The seller, however, may not desire that the property in the goods should pass to the buyer at the moment of delivery to the carrier. He may desire to retain the property until the price is paid or until some condition imposed by him on the buyer is fulfilled by the buyer. This he may do by reserving the right of disposal (*jus disponendi*) of the goods. This right may be reserved by the terms of the contract or appropriation. Where the right of disposal is reserved, the appropriation is *conditional*, and the property does not pass to the buyer until the conditions imposed by the seller are fulfilled by the buyer. As to what those conditions may be, see note to sec. 25, "Modes of reserving right of disposal."

Undertaking by seller to deliver goods at a particular place.—The general rule, as stated above, is that delivery by the seller to the carrier is a delivery to the buyer, and that the risk is, after such delivery, the risk of the buyer. But if by the terms of the contract the seller undertakes to deliver the goods at a certain place, and in order to do so delivers them to a carrier to be taken to that place, sec. 23 (2) does not apply, and the property and risk do not pass to the buyer until the goods are delivered at that place (*v*).

Risk may pass though property has not passed.—Where there is a contract for the sale of goods which constitute part of a larger quantity, and the goods have to be selected by the seller, the property does not pass until the seller has selected the goods and appropriated them to the contract.

(*t*) *Atkinson v. Bell* (1828) 8 B. & C. 277.
Blackburn on Sale, 3rd ed., pp.
139-140.

(*u*) *Dutton v. Solomonson* (1803) 3 B.

& P. 582.

(*v*) See judgment of Lord Cottenham,
L.C., in *Anderson v. Morice*
(1875) 44 L.J.C.P. 10.

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The buyer, however, acquires an undivided interest in the larger bulk, and such an interest is an insurable interest (*w*). Moreover, if the seller gives a delivery order upon the party in possession of the goods in respect of the quantity sold to the buyer, and the buyer accepts the order, the risk of loss from something happening to the goods, such as a deterioration in their quality, passes to the buyer on acceptance of the delivery order (*x*).

Future goods.—The rules stated above apply not only to unascertained goods, but also to future goods, that is, goods to be manufactured or acquired by the seller after the making of the contract of sale. Ill. (c) under the note, "Authority to select and appropriate," is a case of future goods.

✓ 24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

Goods sent on approval or "on sale or return."

(a) when he signifies his approval or acceptance to the seller or does any other act, adopting the transaction ;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Goods sent on approval or on sale or return.—This section relates to specific goods and it should have been placed immediately after sec. 22.

When goods are sent on approval, or on sale or return, or other similar terms, *e.g.*, on trial, the transaction is merely an agreement to sell, and the property and the risk remain in the seller until the buyer does one or other of the things mentioned in the section. If the buyer does any one of those things, the transaction becomes a sale and the property and risk pass to the buyer. Thus if goods are sent on sale or return and the buyer pledges them to a third person, he has *adopted* the transaction and the property passes to him. The seller therefore cannot remove the goods from the third person. This is so even if the pledge is in fraud of the seller who intended that the goods should be disposed of in the ordinary course of business (*y*). The seller, however, may protect himself by delivering the goods on special terms (*z*).

(w) *Inglis v. Stock* (1885) 10 App. Cas. 263.

(x) *Sterns, Ltd. v. Vickers, Ltd.* [1923] 1 K.B. 78.

(y) *Kirkham v. Attenborough* (1897)

1 Q.B. 201; *London Jewellers Ltd. v. Attenborough* (1934) 2 K.B. 206; *U. Sulaiman v. Ma Ywet* ('34) A.R. 198, 151 I.C. 413.

(z) *Weiner v. Gill* [1906] 2 K.B. 574.

✓ 25. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Reservation of right of disposal.—This section is to be read with sec. 23. It is founded on the judgment of Cotton, L.J., in *Mirabita v. Imperial Ottoman Bank* (a). The following are the material passages in the judgment :—

“ In the case of such a contract (that is, a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier, or, unless the effect of the shipment is restricted by the terms of the bill of lading, shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property.” (This corresponds to s. 23.)

“ If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser.” [This corresponds to sub-secs. (1) and (2) of the present section.]

“ If the vendor deals with, or claims to retain the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a

(a) (1878) 3 Ex. D. 164, at p. 172.

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bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the *appropriation* is not absolute, but until acceptance of the draft, or payment or tender of the price, is *conditional only*, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser" (b). [This corresponds to sub-sec. (3).] It is also explanatory of the words "unconditionally appropriated" in sec. 23 (1).

Modes of reserving right of disposal.—The object of reserving the right of disposal of goods is generally to secure that the price shall be paid before the property passes to the buyer. When the goods are sent by sea the seller ships them and takes bills of lading making the goods deliverable to his own order or to that of his agent at the port of discharge. These he transmits to his agent with instructions not to hand them over except on payment of the price. Or he may draw a bill of exchange on the buyer and discount the bill with his own bankers, handing them the bills of lading which their agents at the port of discharge will retain until the bill is paid. In either case, if there is nothing to show the contrary, it is clear that the intention and the effect of so acting is that the property does not pass on shipment of the goods (c). Instead of acting in either of the ways above suggested, the seller may draw on the buyer for the price and transmit the bill of exchange and the bill of lading to the buyer for payment or acceptance of the former. If the buyer does not accept the bill of exchange, he must return the bill of lading. If he does not, no property in the goods passes to him [s. 25 (3)]. The protection obtained by the seller in this case, however, is not complete. If the buyer fraudulently endorses the bill of lading to a third party who acts bona fide and without notice of the fraud, the third party obtains a good title to the goods (d).

26. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Risk *prima facie*
passes with property.

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

(b) See *The Prinz Adelbert* [1917] A.C. 586.

(c) *Mirabita v. The Imperial Ottoman Bank* (1878) 3 Ex. D. 164.

(d) *Cahn v. Pockett's Bristol Channel Co.* (1899) 1 Q.B. 643. The above passage is taken from Aiken's Law of Sale of Goods.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Risk prima facie passes with property.—The general rule is that when goods have become the property of the buyer, he must bear any loss arising from their destruction or injury, whether delivery has been made or not.

Illustrations.

(a) *B* offers, and *A* accepts, Rs. 100 for a stack of firewood standing on *A*'s premises, the firewood to be allowed to remain on *A*'s premises till a certain day and not to be taken away till paid for. Before payment, and while the firewood is on *A*'s premises, it is accidentally destroyed by fire. *B* must bear the loss. This is a case of an unconditional contract for the sale of specific goods in a deliverable state. Therefore sec. 20 applies and the property in the goods passes to the buyer, and along with it the risk, when the contract is made, that is, *B*'s offer is accepted by *A*, though payment and delivery are both postponed.

(b) *A* bids Rs. 1,000 for a picture at a sale by auction. After the bid it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, it falls on *A*. This again is a case of an unconditional contract for the sale of specific goods. Therefore, sec. 20 applies and the property in the picture passes to *A* when the contract is made, that is, when *A*'s offer is accepted, the acceptance being indicated by the fall of the hammer.

Risk is no test of property.—There is nothing to prevent the parties from contracting that though one party has the property in the goods, yet if the goods are lost, the other party is to pay for them; the parties, in other words, may contract that the risk shall pass on delivery irrespective of the passing of the property (e).

Seller or buyer as bailee.—If *A* sells goods to *B*, but continues in possession after sale, he is a bailee of the goods for *B*. Similarly if *A* agrees to sell goods to *B*, who obtains possession thereof before the property in the goods passes to him, *B* is a bailee of the goods for *A*. In either case the duties and liabilities of *A* and *B* as a bailee for the other are not affected by this section.

Analysis of sections relating to passing of property.

(1) Sale is transfer of property in the goods sold from the seller to the buyer (s. 4).

(2) The transfer of property may take place either when the contract of sale is made or subsequent thereto.

(e) See *Anderson v. Maurice* (1875) 1 App. Case. 735.

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(3) The transfer takes place *when the contract is made*, if the goods are specific and *in a deliverable state* and the contract is *unconditional* (s. 20). The transaction in such a case amounts to a *sale*. But if the goods are not in a deliverable state or the contract is not unconditional, the transaction is an agreement to sell as distinguished from a sale.

- (i) The goods may be specific and *in a deliverable state*, but the contract is conditional upon the seller having to do some act to ascertain the price, *e.g.*, to weigh the goods. In such a case the property passes when the goods are weighed and the buyer has notice thereof (s. 22).
- (ii) The goods may be specific, but *not in a deliverable state*, and the contract is conditional upon the seller having to do something to put them in a deliverable state. In such a case the property passes when the seller has put the goods in a deliverable state and the buyer has notice thereof (s. 21).
- (iii) Where specific goods are delivered to the buyer—which cannot be done unless they are in a deliverable state—on approval or on sale or return, the property passes on the fulfilment by the buyer of the condition implied in such a transaction, namely, the buyer signifying his approval or acceptance to the seller (s. 24).

(4) In the case of an agreement to sell *unascertained* or *future* goods, the property passes when the goods are ascertained by appropriating them to the contract (s. 23).

C. i. f. contract.—The buyer under a c.i.f. contract is in effect the insurer of his goods, and the risk *prima facie* attaches to him on and after shipment by the seller, subject to the seller's obligation to tender such valid and effective documents as are contemplated by the contract or as are usual (f). As to what is a c.i.f. contract, see note to sec. 39, "C.i.f. contract."

F. o. b. contract.—In the case of a contract for the sale of goods to be shipped f.o.b., that is, free on board, the property and risk in goods do not, in the absence of special agreement, pass to the buyer till the goods are actually put on board (g).

Transfer of title.

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them

Sale by person not the owner.

(f) *Groom v. Barber* [1915 1 K.B. 316.

(g) *Stock v. Inglis* (1885) 10 App. Cas. 263.

under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by person not the owner.—General rule.—As a general rule, no man can sell goods and give a good title to them unless he is the owner, or some one having his authority or consent, *e.g.*, an agent. And the rule is the same, although the sale is accompanied by a transfer of a bill of lading, delivery order, warrant, or similar documents. Such documents are not negotiable instruments so as by their transfer to pass to the buyer a title superior to that of the seller. A person, therefore, however innocent, who buys goods from one not the owner obtains no property in them whatever (*h*). The general rule of law, as stated by Willes, J., is that "no one can transfer a better title than he himself possesses." This is expressed by the maxim "*nemo dat quod non habet*." (*i*).

Title by estoppel: estoppel of owner.—But though the general rule is as stated above, the owner may be estopped by his conduct from denying the seller's title and setting up his title against the buyer. Negligence on the part of the owner, in order to constitute conduct precluding him from denying the seller's authority to sell, must be more than mere negligence in the management of his own affairs and must amount to a disregard of his obligations towards the buyer (*j*).

Illustration.

A sells unappropriated goods to *B*. *B* applies to *C* for an advance on a pledge of the delivery order. *C* sends the delivery order to *A*'s warehouseman who assures him that it is in order. *C* then makes the advance to *B* who absconds without paying *A*. The warehouseman's statement has led *C* to believe that the goods are ascertained and *A* is estopped from denying that property has passed. *C* is entitled to the goods (*k*). *A*, the owner of a motor

(*h*) Benjamin on Sale, 6th ed., p. 11.

(*i*) *Whistler v. Forster* (1863) 32 L.J.C.P. p. 161, 164.

(*j*) *Heap v. Motorists' Advisory Agency, Ltd.* [1923] 1 K. B. 577.

(*k*) *Woodley v. Coventry* (1863) 32 L. J. Ex. 185.

S. 27 bus, leaves the certificate of registration in the bus. The certificate is equivalent to a document of title. *B*, the driver of the bus, by forgery procures its alteration to his own name, and sells the bus to *C*, a *bona fide* purchaser, for value. *A* is not estopped from denying *B*'s authority to sell, for he could not have anticipated the possibility of a forgery. *C* is not entitled to the bus (1).

Exceptions to the general rule.—There are five important exceptions to the rule that no seller of goods can give to the buyer thereof a better title than himself, namely,—

- (1) Sale by a mercantile agent [proviso to s. 27].
- (2) Sale by one of joint owners (s. 28).
- (3) Sale by a person in possession under a voidable contract (s. 29).
- (4) Sale by one who has already sold the goods but continues in possession thereof [s. 30 (1)].
- (5) Sale by buyer obtaining possession before the property in the goods has vested in him [s. 30 (2)].

All these exceptions are necessary for the protection of persons who deal *bona fide* with mercantile agents and others mentioned in the exceptions.

Sale by mercantile agent.—Mere possession of goods or of the documents of title to goods gives no power to dispose of them. Thus a clerk in a merchant's office who as such is possessed of delivery orders or other documents of title for the purposes of his employment has no power to dispose of them. But it is different when the person in possession of goods is a mercantile agent, such as a factor, broker or auctioneer. A sale by such a person of goods or of the documents of title to goods will pass a good title to the buyer—

- (1) if he is in possession of the goods or of the documents with the consent of the owner ;
- (2) if the sale is made by him when acting in the ordinary course of a mercantile agent ;
- (3) if the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

The proviso to the section is a reproduction of sec. 2 (1) of the Factors Act (English), 1889. It is founded on the principle that where a person has entrusted goods or the documents of title to goods to an agent who, in the course of such agency, sells or pledges the goods, he ought, as regards innocent third parties, to be treated as the owner of the goods. This is the principle running through the earlier Factors Acts of 1823, 1825, 1842 and 1877,

(1) *Mohambaram v. Ram Narayan* (1935) 69 M.L.J. 691, 158 I.C. 535, ('35) A. M. 850.

all of which have been repealed by the Factors Act of 1889. It is a departure from the common law rule that mere possession of goods or of the documents of title to goods does not enable the person in possession to dispose of them in contravention of his instructions in respect of them. The present section deals with the sale of goods by a mercantile agent. Sec. 178 of the Indian Contract Act, 1872, as amended by the Indian Contract (Amendment) Act, 1930, deals with the pledge of goods by a mercantile agent.

Mercantile agent.—The proviso to the section validates a sale by a mercantile agent. A mercantile agent is one who has, in the customary course of his (*m*) business as such agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods [s. 2 (9)]. A person having authority to consign goods is called a forwarding agent.

The term “mercantile agent” does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party. It only includes persons whose employment corresponds to that of some known kind of commercial agent, *e.g.*, a factor, an auctioneer or a broker (*n*). A broker is an agent to make contracts between other persons in matters of trade or commerce. A mercantile agency under this section may exist although the agent is acting for one principal only and has no general occupation as agent. The section does not require a *general* occupation as agent (*o*).

To constitute an agent a mercantile agent he must be (1) a mercantile agent (2) having in the customary course of *his* business as *such agent* authority to sell goods, etc. A mere insurance agent who on a particular occasion is entrusted with pictures to sell on commission is not a mercantile agent. It cannot be said of one who is merely an insurance agent that he has “in the customary course of his business as such agent authority,” etc. A pledge therefore of the pictures given to him for sale would not be valid.

The definition of the term “goods” in sec. 2. (7) shows that the section now under consideration is not confined to dealings in merchandise, but also includes sales of furniture, etc.

Possession must be with consent.—To validate a sale by a mercantile agent under this section he must be in possession of the goods or of the documents of title to the goods *with the consent of the owner*. This

(*m*) The omission of the word “his” in the Sale of Goods Bill was a printers’ mistake. The mistake is repeated in the Act.

(*n*) *Heyman v. Flewker* (1885) 32 L.J.C. P. 132 ; *Cole v. North Western*

Bank (1875) L. R. 10 C. P. 354, 372-373.

(*o*) *Weiner v. Harris* [1910] 1 K. B. 285, on app. (1911) 27 T. L. R. 200 ; *Lowther v. Harris* [1927] 1 K. B. 393.

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implies that he must have been entrusted with the goods as a *mercantile agent* and not in any other capacity, in other words, the capacity in which the agent receives the goods must be one which clothes him with authority to sell or pledge the goods. Thus if a house is let furnished to a person who happens to be an auctioneer, it is left to him as a tenant and not as an auctioneer. He cannot therefore sell the furniture by auction and give a good title to the buyer.

The consent contemplated by this section is consent in fact. If the goods or documents are obtained by theft, there is no consent. Similarly there is no consent if the goods or documents are obtained by what is equivalent to theft, as where *A* falsely pretending that he is *B* receives goods or documents from the owner. But it is different if the party has obtained possession by means of fraud, for in such a case he has obtained possession with the consent of the owner (*p*) though it is not free consent.

Sale must have been made when acting in the ordinary course of business of a *mercantile agent*.—It is not sufficient that the sale is made by a “mercantile agent,” that is, a mercantile agent having in the ordinary course of *his* business as *such agent* authority to sell or pledge the goods [s.2(9)]. The sale must also have been made by him when acting in the ordinary course of business of a mercantile agent. In other words, the seller must occupy the character of a mercantile agent as defined in sec. 2 (9) and, further, he must act within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the buyer or pledgee to suppose that anything wrong is being done, or to give him notice that the sale or pledge is one which he has no authority to make (*q*). So where a mercantile agent employed a friend of his to pledge the goods for him, it was held not to be in the ordinary course of business of a mercantile agent, and the pledge was held to be invalid (*r*).

The matter may be put in another form. If a mercantile agent has *express* authority to sell, and he sells, no difficulty arises. The case then falls within the first part of the section. The difficulty arises when he has no authority to sell and he sells the goods in contravention of his instructions, for instance, where he has authority only to pledge, but he fraudulently sells. In such a case the section applies and protects the innocent pledgee, if the agent has acted “in the ordinary course of business of a mercantile agent.”

In dealing with third person the section gives him authority if he acts “in the ordinary course of business of a mercantile agent,” that is,

(p) *Cahn v. Pockell's Bristol Channel Co.* [1899] 1 Q.B. 643, 654, 659.

(q) *Oppenheimer v. Attenborough* [1908]

1 K.B. 221, per Buckley, L.J.

(r) *De Gorter v. Attenborough* [1904] 21 T. L. R. 19.

an *ostensible* authority. This authority cannot be cut down by private instructions or by a particular trade custom, except that the existence of a notorious trade custom would fix the buyer or the pledgee from the agent with *notice* of a restricted authority to deal with the goods and thus bring the case within the last part of the section (s).

Illustrations.

(1) *A* is a manufacturing jeweller. *B* is a person whose business it is to travel about the country selling jewellery. *A* delivers certain articles of jewellery to *B* upon the terms that they should remain the property of *A* until sold or paid for. *B* fraudulently pledges the jewellery with a pawnbroker and moneylender. The pledge is valid. *B* is a mercantile agent and as such has an ostensible authority to pledge the jewellery (t).

(2) *A*, a diamond merchant, delivers to *B*, a diamond broker, a parcel of diamonds on *B*'s representation that a specified firm of diamond merchants would probably buy them. *B* does not show the diamonds to the firm, but pledges them with *C* who is a *bona fide* pledgee. *A* sues *C* to recover the diamonds. Evidence is given in the suit of a custom in the diamond trade that a diamond broker employed to sell has no authority to pledge them for his principal. The pledge is valid. The ostensible authority which *B* had as a mercantile agent to pledge the diamonds could not be cut down by a particular trade custom (u).

It will be noted that in both the cases cited above the *express* authority was to sell, but the mercantile agent pledged the goods, and the pledge was held valid. The cases being those of a pledge are more appropriate as illustrations of sec. 178 of the Indian Contract Act, 1872, as amended by the Indian Contract (Amendment) Act, 1930.

Good faith and absence of notice on the part of the buyer that the seller has no authority to sell.—To validate a sale by a mercantile agent under this section the buyer must have acted in good faith and must not have at the time of the sale notice that the seller had no authority to sell the goods. The onus of proving both these facts as well as the fact that the agent was in possession of the goods with the consent of the owner rests upon the buyer (v).

Under sec. 3 of the General Clauses Act, 1897, a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not. Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequence (w).

(s) Benjamin on Sale, 6th ed., p. 41.

(t) *Weiner v. Harris* [1910] 1 K.B. 285.

(u) *Oppenheimer v. Allenborough* [1908] 1 K.B. 221.

(v) *Heap v. Motorists' Advisory Agency, Ltd.* [1922] 1 K.B. 577.

(w) *Jones v. Gordon* (1877) 2 App. Cas. 616, 629.

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The term "notice" in this section includes both express and constructive notice. A person is deemed to have constructive notice of a fact when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it (x).

Subject to the provisions of any other law for the time being in force.—The section preserves the powers of sale conferred by other acts. Thus if the pawnor makes default in payment of the debt at the stipulated time, the pawnee may sell the goods pledged and may give a good title to the buyer, though he has only a *special* property in the goods as distinguished from the *general* property which a mortgagee has in the goods mortgaged to him (y). See note to sec. 4 above, "Mortgage, pledge and hypothecation of goods."

Indian Contract Act, 1872, sec. 108.—This section now takes the place of sec. 108, Exception I of the Indian Contract Act. By that Exception it was provided that when any person was, by the consent of the owner, *in possession* of any goods or of the documents of title to the goods, he could transfer the ownership of the goods or documents, and give such person a good title thereto notwithstanding any instructions to the contrary : provided that the buyer acted in good faith and under circumstances which were not such as to raise a reasonable presumption that the person in possession of the goods or documents had no right to sell the goods. The language of that section was very wide, the words of the section being "any person in possession" of the goods or of the documents of title to goods. The Courts, however, endeavoured to keep the results within tolerable bounds by putting a strict construction on the word "possession," and interpreting it to mean juridical possession as distinguished from mere physical possession or custody. It was accordingly held that a sale of buffaloes by a person with whom they were left by the owner to take care of during his absence does not pass a good title to the buyer (z). Similarly where a piano had been hired from the plaintiff with an option of purchase, and the hirer sold the piano to the defendant before he had exercised that option, it was held that the defendant was liable in trover to the plaintiff, although it was found that he acted in good faith (a). These cases would be decided the same way now, the first on the ground that a bailee for safe custody is not a mercantile agent, and the second on the ground that the hirer of goods under a hire-purchase agreement with an option to purchase cannot sell them so as to give a good title to the buyer under sec. 30 (2) below. He can do so only if he is under a binding agreement to buy them, for then he has "agreed to buy goods" within the meaning of that section (b). Under the present

(x) See Transfer of Property Act, 1882, s. 3.

(y) Indian Contract Act, 1872, s. 176.

(z) *Shankar v. Mohanlal* (1887) 11 Bom. 704.

(a) *Greenwood v. Holquette* (1873) 12 Beng. L. R. 42, 46.

(b) *Belsize Motor Supply Co. v. Cox* [1914] 1 K. B. 244.

Act a sale by a person who is not the owner nor is authorized by the owner to sell is not valid unless the case falls within one of the four sections, namely, sec. 27, sec. 28, sec. 29, and sec. 30. The capacity to give a good title to a *bona fide* buyer is now confined to the classes of persons, mentioned in those sections.

Sale in Market overt.—The exceptions to the rule that a person cannot make a valid sale of goods which do not belong to him have already been enumerated in the note "Exceptions to the general rule," above. In England there is an additional exception in the case of sales in market overt. Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (c). Market overt is an open, public and legally constituted market. In the city of London every shop in which goods are openly sold is market overt for such goods as the owner openly professes to trade in. In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops (d). The result is that where goods obtained by theft are sold in market overt, the property in the goods passes to the buyer. There is no such provision in the Indian law. According to the Indian law a thief cannot give a good title to a purchaser from him of goods which he has stolen, however innocent the purchaser may be of any knowledge of the theft. It may be interesting to note that in the Contract Bill as drafted by the Law Commissioners it was provided in effect that a purchaser acting in good faith, and in the absence of suspicious circumstances, might acquire a good title from any person in possession of goods, in other words, that every place in India should be a market overt. The select Committee to which the Bill was referred objected to this clause, the ground of objection being substantially that the provision would make British India an asylum for cattle stealers from the Native States. The clause, after a good deal of controversy, was ultimately moulded in a different form and it appeared as sec. 108 in the Indian Contract Act. In England also the law of market overt has so many exceptions grafted on it that it has long ceased to be of any general importance (e). In fact the Select Committee in the Commons, to which the Sale of Goods Bill [English] was referred, decided for the abolition of the rule of sale in market overt, but the rule was restored in Committee of the whole House, and it is now contained in sec. 22 of the Sale of Goods Act [English] 1893.

(c) Sale of Goods Act [English] s. 22 (1).

(d) Benjamin on Sale, 6th ed., p. 18.

(e) See *Hargreave v. Shink* [1892] 1 Q.

B. 25, and the judgment of

Serutton, J., in *Clayton v. Le Roy* [1911] 2 K. B. 1031, at pp. 1038, *seq.*, where further references may be found.

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28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by a co-owner.—This is the second exception to the rule that a man cannot make a valid sale of goods which do not belong to him. It is a reproduction of Exception 2 to sec. 108 of the Indian Contract Act. *A, B & C* own certain cattle in common. *A* is left by *B* and *C* in possession of a cow which he sells to *D*. *D* purchases *bona fide*. The property in the cow is transferred to *D*.

29. When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale by person in possession under voidable contract.—This section is, in effect, the first part of Exception 3 to sec. 108 of the Indian Contract Act up to the words "buys them in good faith of the person in possession." The wording of the section is taken from sec. 23 of the English Sale of Goods Act, 1893. It is the third exception to the rule that a man cannot make a valid sale of goods which do not belong to him. It deals with the case of a sale by a person who has obtained possession of goods under a contract voidable under sec. 19 or sec. 19A of the Contract Act. Sec. 19 says that where consent to an agreement is caused by coercion as defined in sec. 15, or fraud as defined in sec. 17 or misrepresentation as defined in sec. 18, the agreement is a contract voidable at the option of the party whose consent was so caused. Sec. 19A says that where consent to an agreement is caused by undue influence as defined in sec. 16, the agreement is a contract voidable at the option of the party whose consent was so caused. The present section validates a sale by a person who has obtained possession of goods under a contract voidable at the option of the other party on the ground of coercion, fraud, misrepresentation or undue influence, provided the contract has not been rescinded by the other party at the time of the sale. *A*, by a misrepresentation, induces *B* to sell and deliver to him a horse. *A* sells the horse to *C* before *B* has rescinded

the contract. The property in the horse is transferred to *C*. In such a case, *B* is entitled to compensation from *A* for any loss which *B* has sustained by being prevented from rescinding the contract.

A person may obtain possession of goods under a contract which is voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion or on the ground of undue influence. Possession so obtained is not by the free consent of the lawful owner as defined in sec. 14 of the Indian Contract Act. It is nevertheless possession by consent, and the person in possession may make a valid pledge of the goods, provided the contract has not been rescinded at the time of the pledge. There is in such a case a *de facto* contract, though voidable on the ground of fraud and the like. It is, however, different if there is no real consent, as where goods have been obtained by means of theft as defined in sec. 378 of the Indian Penal Code. A thief has no title and can give none.

Where goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none. Thus if *A* represents to *B* that he is acting as agent for *C*, and *B* relying on that representation delivers goods to *A* as buyer, there is not a voidable contract between *A* and *B*, but no contract at all. No property passes to *A*, and he can neither make a valid sale (*f*) nor a valid pledge. This is really a case of a fundamental error as to the person with whom one is contracting. There is no real consent and no contract; there is only an offer on *B*'s part to the person with whom alone he means to deal and thinks he is dealing; see Contract Act, sec. 13. But if a person buys goods with the intention of not paying for them, there is consent, though not free, and a contract, though voidable (*g*), and he may make a valid sale or pledge of the goods while the contract is still subsisting (*h*), though the fraud may amount to the offence of cheating, as defined in sec. 415 of the Indian Penal Code. This was not so under sec. 178 of the Contract Act. Under that section the buyer who obtained possession of goods "by means of an offence or fraud" could not make a valid pledge. Under the present section a person who obtains possession of the goods under a contract voidable under sec. 19 or sec. 19A may make a valid pledge though the transaction may amount to an offence or fraud.

Good faith.—See note under sec. 178, Indian Contract Act.

Notice.—See note under sec. 178, Indian Contract Act.

(*f*) *Hardman v. Booth* (1863) 32 L. J. Ex. 105.

(*g*) *Clough v. Lond. & N. W. Ry. Co.*

(1871) L. R. 7 Ex. 26.

(*h*) *Croft v. Lumley* (1858) 6 H. L. C. 672, 705.

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30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

Disposition by seller remaining in possession.—Sub-sec. (1) deals with dispositions by a seller continuing in possession of the goods after sale. It says that where a person has sold goods but continues in possession of them or of the documents of title to them, he may sell them to a third person, and if such person obtains delivery thereof in good faith and without notice of the previous sale, he gets a good title to them, although the property in the goods has passed to the first buyer. A pledge, mortgage or any other disposition of the goods is equally valid. The disposition may be made not only by the seller in possession, but also by a mercantile agent acting for him. *A* sells goods to *B*. *B* for his own convenience leaves the goods with *A*. *A* fraudulently sells the goods to *C*, who buys them in good faith and without notice of the sale to *B*. *C* gets a good title to the goods. The delivery of the goods by *A* to *C* has the same effect as if *A* were expressly authorized by *B* to deliver the goods. The transaction would be equally valid if *A* pledged or mortgaged the goods to *C*.

It will be seen from what is stated above that to enable the seller to pass a good title—

- (1) the seller must continue in possession of the goods or of the documents of title to the goods as *such*. Possession as a hirer of the goods from the buyer after delivery of the goods to him will not do ;

- (2) the goods must have been delivered to the buyer or the documents of title must have been transferred to him. A mere *agreement* for sale, pledge or other disposition will not do ;
- (3) good faith and absence of notice of the previous sale on the part of the second buyer.

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Disposition by buyer obtaining possession.—Sub-sec. (2) deals with the converse case of a sale or other disposition by the buyer of goods in which the property has not yet passed to him. The section says that if the buyer obtains possession of the goods, before the property in them has passed to him, with the consent of the seller, he may sell, pledge or otherwise dispose of the goods to a third person, and if such person obtains delivery of the goods in good faith and without notice of any lien or other right of the original seller in respect of the goods, he will get a good title to them. As to an unpaid seller's lien, see sec. 47 ; as to his right of stoppage in transit, see sec. 50 below.

To enable the buyer to pass a good title—

- (1) There must be possession of the goods or documents with the consent of the seller. *A* sells certain copper to *B* and draws on *B* for the price and forwards to *B* the bill of exchange and bill of lading (endorsed in blank) together to secure acceptance or payment of the bill. *B* who is insolvent does not accept the bill of exchange, but transfers the bill of lading to *C* in fulfilment of a contract to supply him with copper. *C* in good faith pays the price. *A* cannot stop the copper in transit. Here *B*, not having accepted the bill of exchange, was bound to return the bill of lading to *A*, and the property in the goods did not pass to him [s. 25 (3)]. *B*, however, has possession of the bill of lading with the consent of the seller, the seller having voluntarily, and without being deceived by any trick, sent it to him. *B* therefore could pass a good title to *C* (i).
- (2) The goods must have been delivered to the buyer or the documents of title transferred to him. A mere *agreement* for sale, pledge or other disposition will not do ;
- (3) There must be good faith, and absence of notice of the seller's right of property on the part of the second buyer.

Hire-purchase agreements.—The hirer under a hire-purchase agreement is not a person who "has agreed to buy goods" within the meaning of sub-sec. (2) unless he has *bound* himself to buy. A mere option to purchase is not sufficient (j).

(i) *Cahn v. Pockett's Bristol Channel Co.* [1899] 1 Q.B. 643.

(j) *Belsize Motor Supply Co. v. Cox* [1914] 1 K.B. 244.

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Mercantile agent.—For the definition of mercantile agent, see sec. 2 (9).

Documents of title to goods.—For the definition of documents of title to goods, see sec. 2 (4).

CHAPTER IV.

PERFORMANCE OF THE CONTRACT.

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Duties of seller and buyer.

Duties of seller and buyer.—The two parties to a contract of sale are the seller and the buyer, and each has his duties and obligations to perform. The duty of the seller is to deliver the goods, whether he is the owner or not, and whether he has the goods in his possession at the time of the contract of sale or not. The duty of the buyer is to accept the goods (s. 42) and to pay for them. Both these duties are to be performed in accordance with the terms of the contract of sale.

32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Payment and delivery are concurrent conditions.

Payment and delivery are concurrent conditions.—This section says that delivery of the goods and payment of the price are concurrent conditions. Concurrent conditions mean that they have to be performed simultaneously, that is to say, the seller must be ready and willing to give delivery *in exchange for the price*, and the buyer must be ready and willing to pay the price *in exchange for possession of the goods*.

The section begins with the words “unless otherwise agreed,” and therefore the rule laid down in this section applies “unless otherwise agreed.” Thus if *A* sells goods to *B* on credit, and nothing is said as to the time of delivery, the buyer is entitled to *immediate* possession, without paying the price when possession is given.

33. Delivery of goods sold may be made by doing any- S. 33
 thing which the parties agree shall be
 Delivery. treated as delivery or which has the
 effect of putting the goods in the possession of the buyer or
 of any person authorised to hold them on his behalf.

Delivery how made.—The first part of the present section which says that delivery may be made by doing anything which the parties agree shall be treated as delivery presents no difficulty. The question is one of *agreement* between the parties, and where a dispute arises the Court is called upon to do no more than ascertain what the *agreement* between the parties was.

The second part of the section says that delivery may be made by doing anything which has the *effect* of putting the goods in the possession of the buyer. This part of the section may be explained by the following illustrations.

Illustrations.

(1) *B*, in England, orders 100 bales of cotton from *A*, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to *B*.

(2) *A* sells to *B* 50 maunds of rice in the possession of *C*, a warehouseman. *A* gives *B* an order to *C* [called a delivery order] to transfer the rice to *B*, and *C* assents to such order, and transfers the rice in his books to *B*. This is a delivery to *B*.

(3) *A* agrees to sell *B* 5 tons of oil, at Rs. 1,000 per ton, to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had 20 tons of the oil, an order to transfer 5 of them into the name of *B*. *C* makes the transfer in his books, and gives *A*'s clerk a notice of the transfer to *B*. *A*'s clerk takes the transfer notice to *B*, and offers to give it to him on payment of the price of the oil. *B* refuses to pay. There has been no delivery to *B*, as *B* never assented to make *C* his agent to hold for him the 5 tons selected by *A*. [The assent of all the three parties, namely, (1) the seller, (2) the buyer, and (3) the seller's bailee is necessary to constitute a transfer of possession, as in ill. (2).]

✓ **Symbolic delivery.**—Delivery of the key of a godown or warehouse is symbolic delivery of the goods therein. Delivery of a key, however, does not operate as delivery of the goods under the lock if it does not in fact give complete access to them (*k*).

(*k*) *Milgate v. Keble* (1841) 3 Man. & Gr. 100.

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Illustrations.

(1) *A* sells to *B* certain specific goods which are locked up in a godown. *A* gives *B* the key of the godown in order that he may get the goods. This is a delivery to *B*.

(2) *A* sells to *B* certain specified goods which are locked up in a receptacle, but retains the key of the outer enclosure. This is not a delivery to *B*.

✓ **Constructive delivery.**—There may be a change in the possession of goods, and therefore delivery within the definition above, without any change in their actual and visible custody. There is said to be a constructive delivery in such cases. Ill. (2) under the heading "Delivery how made" is an instance of constructive delivery. The handing over of the delivery order by the seller to the buyer *and* the assent of the seller's bailee [warehouseman in that illustration] constitutes a constructive delivery. But all the three parties must concur. The warehouseman by *assenting* to hold the goods for *B* attorns to *B*. Such an "agreement of attornment," as it is sometimes called, has the effect of transferring the legal possession to the buyer. Note that in ill. (3) under the heading "Delivery how made," all the three parties did not concur. *B*'s assent was wanting.

34. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Part delivery.—This affirms the common law rule that delivery of part may be a delivery of the whole if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention (*l*). A delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place *in the course of the delivery of the whole*; in such a case the taking possession by the buyer of that part is the acceptance of constructive possession of the whole (*m*). But if part of the goods be delivered *with intent to separate that part from the rest*, it is not an inchoate delivery of the whole (*n*). The following illustrations explain the scope of the section.

(1) A ship arrives in a harbour laden with a cargo consigned to *A*, the buyer of the cargo. The captain begins to discharge it, and delivers

(*l*) Per Lord Blackburn in *Kemp v. Falk* (1882) 7 App. Ca. 573, 586.

R. 1 C. P., p. 440.

(*n*) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 339.

(*m*) *Bolton v. L. & Y. R. Co.* (1866) L.

over part of the goods to *A* in progress of the delivery of the whole. This is a delivery of the cargo to *A* for the purpose of passing the property in the cargo.

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(2) *A* sells to *B* a stack of firewood, to be paid for by *B* on delivery. After the sale, *B* applies for and obtains from *A* leave to take away some of the firewood. This has not the legal effect of a delivery of the whole.

(3) *A* sells 50² maunds of rice to *B*. The rice remains in *A*'s warehouse. After the sale, *B* sells to *C* 10 maunds of the rice, and *A*, at *B*'s desire, sends the 10 maunds to *C*. This has not the legal effect of a delivery of the whole.

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Buyer to apply for delivery.—This is a reproduction of sec. 93 of the Indian Contract Act. There is no such section in the English Sale of Goods Act. The rule contained in this section has been found in practice to be very salutary.

B buys goods from *A*, and assigns the benefit of the contract to *C*. *C* applies for delivery. *B* then takes a reassignment from *C* and sues *A* on the contract without making any demand for the goods. It is found that the assignment to *C* was fictitious. *B* is not entitled to adopt the demand for delivery made by *C*. Such a demand is no demand at all, and *B*'s suit should be dismissed. He ought to have made a *fresh* demand for the goods (o).

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(o) *Mulji v. Nathubhai* (1890) 15 Bom. 1.

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(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf :

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Rules as to delivery.—The rules as to delivery stated in this section are based on sec. 29 of the English Sale of Goods Act. They may be varied by agreement between the parties.

Rule (1)—Place of delivery.—The first part of this rule deals incidentally with the *mode* of delivery, and the second part with the *place* of delivery (*p*). The section lays down a specific rule as to the place of delivery, but none as to the mode of delivery. The mode of delivery, that is, whether the seller is to send the goods to the buyer or the buyer is to take possession of them, depends, says rule (1), on the *contract* between the parties. The contract may be express or implied. In the absence of any such contract, the mode of delivery may be governed by the usage of the trade.

In the absence of any contract express or implied as to delivery, delivery has to be made at the place stated in this rule. *A* agrees to sell goods to *B* "to be delivered at any place in Bengal to be mentioned hereafter." Here there is an express contract as to delivery giving the buyer the right to fix the place anywhere in Bengal. If the buyer demands delivery, say, at the Howrah railway station, the seller must deliver the goods at that station (*q*).

Rule (2)—Time for delivery.—*A* agrees to sell and deliver goods to *B* "as required." *B* is not entitled to wait indefinitely. He must require delivery within a *reasonable* time. If *B* fails to do so, *A* may rescind the contract, that is, put an end to it, but he cannot do so without previous notice to *B* giving *B* a reasonable time to pay for and take delivery of the goods (*r*). See Indian Contract Act, sec. 46.

(*p*) Chalmers' Sale of Goods, 10th ed.,
p. 86.

(*q*) *Grenon v. Lachmi Narain* (1896)

23 L. A. 119, 24 Cal. 8.

(*r*) See *Jones v. Gibbons* (1853) 8
Exch. 920, 922.

Rule (3)—Goods in possession of third person.—When the goods are in the possession of a third person, *e.g.*, a warehouseman, there is no delivery unless he assents to attorn to the buyer and becomes his bailee instead of that of the seller (*s*). *A* sells to *B* 50 maunds of rice in the possession of *C*, a warehouseman. *A* gives *B* an order to *C* to transfer the rice to *B*. *C* assents to the order and transfers the rice in his books to *B*. This is a delivery of the goods to *B*. By assenting to the order, *C* attorns to *B*, the buyer, and becomes *B*'s bailee. Before the assent *C* held the goods as the bailee of *A*, the seller.

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Issue or transfer of document of title to goods.—The expression "document of title to goods" is defined in sec. 2 (4) of the Act. It includes a bill of lading and a railway receipt. The proviso covers the case of goods *in course of transit* at sea or on land. In the case of goods while they are at sea, the lawful transfer of a bill of lading operates as a delivery of the goods themselves (*t*). And so does a railway receipt in the case of goods in course of transit on land (*u*).

Rule (5)—Expenses of delivery.—*A* agrees to sell and deliver goods to *B*. The agreement is silent as to the expenses of putting the goods in a deliverable state, that is to say, in such a state, that the buyer would under the agreement be bound to take delivery of them [s. 2 (3)]. The expenses must be borne by *A*. He cannot charge *B* with them. If *B* is compelled to pay them, he may recover them from *A*.

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

Delivery of wrong quantity.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods

(s) *Bentall v. Burn* (1824) 3 B. & C. 423, 3 L. J. K. B. 42.

(t) See *E. Clemens Horst & Co. v. Biddel Bros.* [1912] A. C. 18, adopting Kennedy, L. J.'s dissenting judgment in *Biddel*

Brothers v. E. Clemens Horst & Co. [1911] 1 K. B., at pp. 952, 956.

(u) *Ramdas v. Amerchand & Co.* (1916) 43 I. A. 164, 40 Bom. 630.

S. 37 which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

✓ *Delivery of wrong quantity.*—This section provides for three cases, namely, where the seller delivers to the buyer—

- (1) a quantity *less* than he contracted to sell ;
- (2) a quantity *larger* than he contracted to sell ;
- (3) goods ordered mixed with goods of a *different description*.

When the seller delivers a smaller or a larger quantity of goods than was ordered under an entire contract, such delivery amounts to a proposal by the seller for a new contract (v).

(1) **Delivery of less.**—The following cases explain the operation of sub-sec. (1). They may be stated in the form of illustrations—

Illustrations.

(a) *A* agrees to sell and deliver to *B* 500 maunds of rice, but only 420 are delivered. *B* has the rice weighed and he accepts the quantity sent. *B* cannot afterwards object that the whole of the 500 maunds was not delivered, and he must pay for the 420 maunds accepted by him at the contract rate (w).

(b) *A* sells to *B* 2,000 gross of "200 yards reels" of sewing cotton. After taking delivery *B* finds that the length of the cotton per reel is less than 200 yards, the average shortage being about 6 per cent. The case is one of short delivery, and *B* is entitled to damages (x).

(c) *A* agrees to sell and deliver "200 tons, 5 per cent. more or less," of certain goods. *A* may under this contract deliver 5 per cent. more, that is, 210 tons [see sub-s. (2)], or he may deliver 5 per cent. less, that is, 190 tons, and the buyer cannot refuse delivery in either case (y).

(2) **Delivery of more.**—*A* orders of *B* 2 dozen bottles of wine. *B* sends 5 dozen. *A* is entitled to reject the whole. Or he may accept 2 dozen and reject the rest. If he accepts all the 5 dozen, he must pay for them at the contract rate (z).

(v) See *Cunliffe v. Harrison* (1851)
6 Exch. 903, at p. 906.

(w) *Morgan v. Gath*, 3 H. & C. 478,
34 L. J. Ex. 165.

(x) *Beck & Co. v. Syzmanowski & Co.*

[1924] A. C. 43.

(y) *Re Thornett Fehr Yuills, Ltd.*
[1921] 1 K. B. 219.

(z) See *Hart v. Mills*, 15 M. & W. 85,
15 L. J. Ex. 200.

(3) **Mixed delivery.**—The words “mixed with” in sub-sec. (3) mean “accompanied by.” The sub-section provides for the case where the seller sends to the buyer the goods he contracted to sell with goods of a different description, that is, a different class, kind or sort.

(a) *A* orders of *B* specific articles of china. *B* sends these articles to *A* in a hamper with other articles of china which had not been ordered. *A* may refuse to accept any of the goods sent (a).

(b) *A*, under a contract for the sale of Ruabon coals, sends one lot of 15 tons of such coals, and another lot of 7 tons of coals which are not Ruabon coals, and mixes them all together in delivery. The whole of the quantity so delivered must be considered not according to contract, and the delivery is a bad delivery (b).

(c) *A* agrees to sell to *B* 3,000 tins of canned fruit to be packed in cases, each containing 30 tins. About one-half of the goods tendered are packed in cases, each containing 24 tins. *B* is entitled to reject the whole consignment. He is not bound to accept the cases properly packed, though the market value of the whole consignment is not affected by the mixture (c). This is a case of mixing up goods agreed to be sold with goods of a different description.

(d) The word “description” in sub-sec. (3) is to be strictly construed. The sub-section entitles the buyer to accept the goods which are in accordance with the contract and reject the rest only if the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description. Thus if goods of the description ordered are delivered, but some of them are of inferior quality, the case is not within this sub-section. In such a case the remedy of the buyer is to accept or to reject all (d). See secs. 12 (2) and 16 above.

38. (1) Unless otherwise agreed, the

Instalment deliveries. buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the

(a) *Levy v. Green* (1859) 8 E. & B. 575.

(b) *Nicholson v. Bradfield Union* (1866) L. R. 1 Q. B. 620.

(c) *Moore & Co. v. Landaner & Co.*

[1921] 2 K. B. 519.

(d) *Aitken Campbell & Co. v. Bullen & Gatenby* [1908] Sess. Cas. 490 [Scotland].

- S. 38 contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

Instalment deliveries.—This section is an application to contracts of sale of the general principle contained in sec. 39 of the Indian Contract Act. Cases of the kind which fall to be decided under the present section were decided before the Sale of Goods Act under secs. 39 and 120 of the Contract Act. Sec. 120 occurred in the Chapter on Sales. It was in these terms: "If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale."

✓ "The rule of law is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it *goes to the root of the contract*, it is a good defence to say, 'I am not going to perform my part of it when that which is at the root of the whole and the substantial consideration for my performance is defeated by your misconduct' " (e).

A mere refusal to pay for one or more instalments of goods, to be delivered by instalments at stated times and to be paid for on delivery, *unaccompanied by any other act*, does not amount to a repudiation of the contract so as to discharge the other party from performing his contract. In each case all the circumstances have to be considered in determining whether there is evidence on which it may be found that there has been a *repudiation* of the contract (f). Where the repudiation is on the part of the seller, the buyer is relieved from his obligation to accept the residue of the goods. Where the repudiation is on the part of the buyer, the seller is not bound to tender the residue of the goods; he need not make or offer goods which he knows the buyer will refuse (g). Where a buyer of straw, which was to be delivered in instalments and paid for on delivery, said to the seller, in effect, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do; I will always keep one bundle of straw in hand so as to have a check upon you," it was held he had shown an intention to repudiate the contract, and that the seller might treat it as at an end (h).

The law on the subject may be stated in one sentence thus: unless otherwise agreed [ill. (i)], mere failure to make one of a series of payments

- (e) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* [1884] 9 App. Cas. 434, at p. 443.
 (f) *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *Cornwall v. Henson* [1900] 2 Ch. 298.
 (g) *Gort v. Ambergate Ry. Co.* (1851)

- 17 Q. B. 127.
 (h) *Withers v. Reynolds*, 2 B. & Ad. 882, approved by the House of Lords in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* [1884] 9 App. Cas. 434, at p. 442.

[ill. (ii)], or to make one or more deliveries, will not generally, in the absence of a *prospective* refusal, discharge the other party from proceeding with the contract.

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Illustrations.

(i) *A* agrees to sell goods to *B* to be delivered in three instalments in January, February and March, 1931, and paid for within 14 days after delivery, "all payments to be made on due date as a *condition precedent* to future deliveries." *B* fails to pay for the first instalment on the due date. *A* may refuse to make further deliveries (i). See sec. 11 above, "Stipulations as to time."

(ii) *A* agrees to sell to *B* 300 tons of sugar, "the shipment to be made during September and October next in lots of about 75 tons in a shipment," payment to be made in cash before delivery. *A* informs *B* of the arrival of the first shipment and demands payment, but *B* fails to pay. This does not discharge *A* from making further deliveries (j).

39. (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

(i) *Ebbw Vale & Co. v. Blaina Iron Co.* (1901) 6 Com. Cas. 33.

(j) *Rash Behary v. Nritya Gopal* (1906) 33 Cal. 477. See also

Sooltan Chund v. Schiller (1878) 4 Cal. 252; *Volkart Bros. v. Rutna Velu* (1894) 18 Mad. 63.

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Delivery to carrier or wharfinger: Sub-secs. (1) and (2).— This section is a combination of sec. 32 of the English Sale of Goods Act and sec. 91 of the Contract Act.

If a tradesman orders goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to a carrier, the delivery to the carrier is *prima facie* deemed to be a delivery to the buyer; but it does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the carrier responsible for the safe delivery of the goods. The same rule applies where the goods are delivered to a wharfinger.

Illustration.

B, at Agra, orders of *A*, a tradesman in Calcutta, 3 casks of oil to be sent to him by railway. *A* takes 3 casks of oil directed to *B* to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the railway company responsible for their safety. The goods do not reach *B*. There has not been a sufficient delivery to charge *B* in a suit for the price. It was *A*'s duty to secure the responsibility of the carriers for the safe delivery of the goods, and to put the goods into such a course of conveyance as that in the case of a loss the buyer might have his indemnity against the carrier (*k*).

Sub-sec. (3): Sea transit.—This sub-section contemplates the case (1) where goods are sent by sea and (2) it is usual for the *buyer himself* to insure. In such a case it is the duty of the seller to give such notice of the shipment to the buyer as may enable him to insure the goods. If he does not, the risk does not pass to the buyer.

The three common forms of contract as regards carriage by sea are

- (1) F.o.b.
- (2) C. i. f.
- (3) Ex-ship.

This section applies to f. o. b. contracts. It does not apply to a c. i. f. contract, for the insurance in the case of such a contract is to be effected by the *seller* and it is specified in the contract itself. Nor does it apply to ex-ship contracts.

Imp 1. **F.o.b. contract.**—*A*, in Calcutta, orders goods of *B*, a merchant of London. The contract contains a stipulation that *B* shall deliver the goods "f. o. b.," that is, "free on board." The meaning of these words is that *B*, the seller, is to put the goods on board at his own expense. Immediately the goods are put on board, the property and the risk pass to the buyer. The goods are at the buyer's risk and he is responsible for

(*k*) *Clarke v. Hutchins* (1811) 14 East. 475.

the freight and subsequent charges including insurance (l). But the seller has in such a case to give such notice to the buyer as may enable the buyer to insure. If the seller fails to do so, the goods are deemed to be at his risk during the transit, unless the buyer has information from other sources about the shipment so as to enable him to insure the goods (m). It may be as well to explain the terms "c.i.f." and "ex-ship."

✓ 2. C. i. f. contract.—A contract on c.i.f. terms means a contract at a price to cover cost, insurance and freight. In the absence of any special provision to the contrary, the seller is bound under such a contract to do the following things: First, to make out an invoice of the goods sold: [the invoice shows the cost of the goods]. Second, to ship at the port of shipment goods of the description contained in the contract. If the goods shipped do not correspond with the contract description, there is a breach of the contract when the goods are shipped. Third, to procure a contract of affreightment (bill of lading) under which the goods will be delivered at the destination named in the contract: [the bill of lading shows *inter alia* the date of shipment and freight]. The contract of affreightment must cover the whole transit; a through bill of lading from an intermediate port is insufficient. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. If the goods are not covered by an effective policy, there is a breach of the contract even if the goods arrive safely. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of insurance, so that the buyer may know what freight he has to pay, and obtain delivery of the goods if they arrive, or recover for their loss if they are lost on the voyage. If no place is named in the contract for the tender of the documents, they must *prima facie* be tendered at the residence or place of business of the buyer (n).

A c.i.f. contract is not a mere sale of documents, though the buyer has to pay against delivery of documents. It is a sale of goods, though they are deliverable by means of documents; in other words, delivery of

(l) *Stock v. Inglis* (1884) 12 Q.B. D. 564 at p. 573 affmd.; *Inglis v. Stock* (1885) 10 App. Cas. 263; *Wimble v. Rosenberg* [1913] 3 K.B. 743 at p. 757; *Diamond Alkali Export Corporation v. Bourgeois* [1921] 3 K.B. 443.

(m) *Northern Steel and Hardware Co. v. Ball & Co.* (1917) 33 T. L. R. 516.

(n) *Johnson v. Taylor Bros. & Co.* [1920]

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A. C. 144, 145; *Biddell Brothers v. E. Clemens Horst & Co.* [1911] 1 K. B. 214, at p. 220, per Hamilton, J., approved A. C. [1912] 18; *Hannson v. Hamel and Horley* [1921] 26 Com. Cas. 236, affmd. [1922] 2 A. C. 36; *Diamond Alkali Co. v. Bourgeois* [1921] 3 K. B. 443; *Steel Brothers & Co., Ltd. v. Dayal Khatao & Co.* [1923] 47 Bom. 924, 25 Bom. L.R. 1203.

Ss. 39-41 ✓ documents is symbolical of delivery of the goods (o). As to inspection of goods before payment, see notes under sec. 41 below.

3. Ex-ship contract.—In the case of a contract of sale “ex-ship” the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery, and has reached the usual place of delivery therein for the discharge of goods of the kind in question. The seller has therefore to pay the freight and to provide the buyer with an effectual direction to the master of the ship to deliver (p).

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Risk where goods are delivered at distant place.

Deterioration of goods in transit to buyer.—Where the seller agrees to deliver the goods to the buyer at a place other than that where they are when sold, the merchantable quality of the goods may be affected by the operation of the transit. In such a case the section throws the risk of *necessary* deterioration on the buyer. *A* agrees to sell hoop iron to *B* to be sent from port *X* to port *Y*. The iron is clean and bright when it is despatched, but it is rusted to a certain extent before it reaches port *Y*. The rusting is no more than what would necessarily occur in the course of transit. The seller is not responsible if the iron becomes unmerchantable to that extent (q). The section also applies to animals sent for human food from one place to another (r).

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Buyer's right of examining the goods.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(o) *Olympia Oil Co. v. Produce Brokers Co.* [1917] 1 K. B. 320; *Johnson v. Taylor Bros. & Co.* [1920] A.C. 144.

(p) *Yang-tze Ins. Ass. v. Lukmanji*

[1918] A.C. 585-589.

(q) *Bull v. Robinson* (1854) 10 Exch. 342.

(r) See *Beer v. Walker* (1877) 46 L.J. C.P. 677 (rabbits).

Buyer's right to inspect before acceptance.—Sub-sec. (2) deals with the case where the seller *tenders* delivery of goods to the buyer, sub-sec. (1) with the case where goods *are delivered* to the buyer which he has not previously examined.

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If the seller gives notice to the buyer that casks containing goods ordered by the buyer are at a particular place ready for delivery on payment of the price, but does not allow the buyer to open the casks to enable him to inspect the goods, it is not a valid tender of the goods (s). But the right of inspection may be waived. It may also be excluded by agreement between the parties (t), as where goods are sold on c. i. f. terms. In such a case the buyer is not entitled to inspect the goods before payment. He is bound to pay against the delivery of the shipping documents, whether the goods have arrived or not. See cases cited in notes to sec. 39 under the heading "C. i. f. contract." See Indian Contract Act, sec. 38, cl. (3).

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Acceptance.

Acceptance.—Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless he has had a reasonable opportunity of examining them. Mere receipt is no acceptance. Receipt, however, becomes acceptance if the right of rejection is not exercised within a reasonable time, or if the buyer does any act in relation to the goods which is inconsistent with the ownership of the seller. Where goods are delivered at a place where the buyer has a reasonable opportunity of examining them, and the buyer without examination sends them to his sub-purchaser, he does an act which is inconsistent with the ownership of the seller, and he must be deemed to have accepted them. He cannot *reject* them, though he may be entitled to *damages* if the goods do not correspond with the contract description (u).

It may be that, owing to *special circumstances*, such as the difficulty of opening and reclosing metal vessels, the goods cannot be inspected when they are delivered to the buyer, but only at their final destination. In such a case, if on examination the goods are found to be of inferior quality,

(s) *Isherwood v. Whitmore* (1843) 11 M. & W. 347.

819, 12 L. J. C. P. 9 [sale by auction].

(t) *Pettitt v. Mitchell* (1842) 4 M. & G.

(u) *Hardy & Co. v. Hillerns* [1923] 2 K.B. 490. See also s. 13 (2).

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the damages will be assessed according to the prices ruling at the *date of the examination by the ultimate consignees (v)*.

43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods.

Buyer not bound to return rejected goods.—Where a buyer rejects goods as not being of the contract description, it is not his duty to send them back to the seller; it is enough for him to give a clear notice that they are not accepted, and then they are at the seller's risk (*w*). He is not bound to put himself to the expense and trouble of returning the goods, and it is the seller's business to take away the goods if he is so minded (*x*). But the buyer, being a bailee of the goods, though an involuntary one, must take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own (*y*).

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Buyer's liability for delay in taking delivery.—This section contemplates the case where the property in the goods has passed to the buyer and he has become the owner thereof. In such a case if the buyer fails to take delivery, he is liable to the seller for any loss occasioned by his default, and also for a reasonable charge for the care and custody of the goods. Conversely, if the seller delays delivery, and the buyer notwithstanding the delay accepts delivery, the seller is liable for any loss occasioned by the delay.

- (v) *Vanden Hark v. R. Marten & Co.* [1920] 2 K.B. 851 as explained in *Saunt v. Belcher and Gibbons* (1920) 90 L.J.K.B. 541.
(w) *Grimaldby v. Wells* (1875) L. R. 10 C. P. 391 [treated as not

- really arguable]; *Sumer Chand v. Ardeshir* (1907) All. W. N. 67.
(x) *Phaggu Mal v. Babu Lal* (1913) 35 All. 325.
(y) See *Okel v. Smith* (1815) 1 Stark 107, and Indian Contract Act, s. 151.

CHAPTER V.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

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45. (1) The seller of goods is deemed "Unpaid seller" defined. to be an "unpaid seller" within the meaning of this Act—

- (a) when the whole of the price has not been paid or tendered ;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

"Unpaid seller" defined.—The seller of goods who is "unpaid" has certain rights conferred upon him by sec. 46. A seller is unpaid so long as he has not received the *whole* price, also if the buyer has given him a bill for the price and the bill is dishonoured, unless it was given in absolute, as distinguished from conditional, payment (2). Whether it was given in absolute or conditional payment is a question of fact in each case.

If the seller endorses the bill of lading in favour of his agent, the agent is an "unpaid seller," and he may exercise the rights conferred upon an "unpaid seller," *e.g.*, stop the goods in transit *in his own name*. The reason is that the endorsement of a bill of lading vests the property in the endorsee and entitles him to possession of the goods.

A merchant who buys on his own credit for another to whom he endorses the bill of lading is in the position of a "seller" for the purpose of exercising the rights given by sec. 46 (a); and so is a broker liable on a "principal contract" (b). But a buyer of goods, who pays for them and, finding that they are not of the contract description, rejects them, is not in the position of an unpaid seller (c).

(2) *Cowasjee v. Thompson* (1845) 3 M.I.A. 422.

(1919) 46 Cal. 831.

(a) *Feize v. Wray* (1802) 3 East. 93.

(c) *Lyons & Co. v. May and Baker* [1923] 1 K.B. 685.

(b) *Ramendra Nath v. Brajendra Nath*

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46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

Unpaid seller's rights.

(a) a lien on the goods for the price while he is in possession of them ;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

✓ Unpaid seller's rights.—The unpaid seller has, by implication of law, the following rights, *notwithstanding that the property in the goods may have passed to the buyer, namely :—*

(a) a lien on the goods for the price while he is in possession of them ;

(b) if the buyer becomes insolvent before payment, a right to stop the goods in transit after he has parted with the possession of them ;

(c) a right of re-sale, which implies that he is in possession.

The seller's *lien* is exercisable when the price is due and unpaid, whether the buyer is insolvent or not. The right of *stoppage in transit* arises only when the buyer is insolvent. The lien attaches only if the seller is in possession. The right of stoppage arises only if he has parted with possession and his lien is gone.

Sub-sec. (2).—Suppose the property in the goods has *not* passed to the buyer, and the buyer becomes insolvent before the price is paid. Here the seller, being still the owner, can have no such right as a lien, for a man cannot have a lien on his own goods. But he has the right to withhold delivery of the goods. This right is *analogous to a lien (d)*, and is sometimes called a quasi-lien.

(d) *Griffiths v. Perry* (1889) 28 L.J.Q.B. 204.

Unpaid seller's lien.

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47. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

Seller's lien.

(a) where the goods have been sold without any stipulation as to credit ;

(b) where the goods have been sold on credit, but the term of credit has expired ;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Unpaid seller's lien.—The lien of an unpaid seller is a right to retain possession of the goods until tender or payment of the price. The lien depends on actual *possession* and not on *title*, and is not affected by his having parted with a document capable of transferring *title*. He may have given a bill of lading which passes the legal property in the goods, or he may have given a delivery order which, though it does not pass the legal title or property in the goods, enables the person receiving it to acquire possession of the goods and acquire a *title* in that way, but whatever he has done in that respect does not destroy his right of lien as long as he keeps *possession* of the goods as vendor (e). Accordingly, it has been held that the giving a delivery order by a seller to a buyer does not of itself give the buyer such a possession of the goods as to defeat the seller's lien for the price (f). But the seller's lien may be defeated where the circumstances of the case are such as to estop him from denying that payment had been received for the goods to which the delivery order related (g).

Lien extends only to price.—The lien extends only to the price. It does not extend to warehouse or other charges for keeping the goods, for they are kept against the buyer's will. For these the seller has only a *personal* remedy against the buyer (h).

Tender of price extinguishes lien.—The section says that the seller is entitled to a lien until payment or tender of the price. A tender of the price, therefore, puts an end to the lien even if the seller declines to receive the money (i).

(e) *Imperial Bank v. London and St. Katherine Docks Co.* (1877) 5 Ch. Div. 195, 200.

(f) *Le Geyt v. Harvey* (1884) 8 Bom. 501.

(g) *Anglo-India Jute Mills Co. v.*

Omademull (1910) 38 Cal. 127.

(h) *Somes v. British Empire Shipping Co.* (1860) 30 L. J. Q. B. 229.

(i) *Martindale v. Smith* (1841) 1 Q. B. 389.

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The unpaid seller is entitled to a lien only in the three cases mentioned in the section. These may be considered in order.

1. **No stipulation as to credit.**—Where goods are sold, and nothing is said as to the time of delivery or the time of payment, the seller is entitled to retain possession until the price is paid, although the property in the goods may have passed to the buyer (*j*).

2. **Sale on credit.**—A sale on credit operates as a waiver of the lien during the currency of the credit. But if the goods are left in the seller's possession till the credit has expired, the lien revives even if the buyer is not insolvent (*k*). *A* sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s possession till the expiry of the three months, and then does not pay for them. *A* may retain the goods for the price.

3. **Insolvency of buyer.**—If the buyer becomes insolvent before the price is paid, and the seller is in possession of the goods, he is entitled to retain possession even if the goods are sold on credit and the term of credit has not expired. *A* sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse. Before the expiry of the three months *B* becomes insolvent. *A* may retain the goods for the price.

Sub-sec. (2): seller holding as buyer's bailee.—The section says that the unpaid seller may exercise his right of lien notwithstanding that he has assented to hold the goods as bailee for the buyer. It may be logically argued that by ceasing to possess in his original character, and agreeing to hold possession on the buyer's account, he has abandoned his lien; and this reason was allowed by English authorities before the English Sale of Goods Act, 1893, when the buyer was merely in default; but if the buyer was insolvent, the right of lien was held to revive. This distinction was done away with by sec. 41 of the English Act, and an unpaid seller, though he holds the goods as bailee for the buyer, may now exercise his right of lien whether the buyer is insolvent or has merely made default in payment of the price. The Indian section follows the English section. On the 1st January 1931 *A* sells to *B* certain goods in *A*'s warehouse, and receives from *B* a bill payable on 1st March 1931. The goods are kept at *B*'s request in *A*'s warehouse, and *B* pays rent for it. *B* deals with the goods as his own, and sells part of them which are delivered to the sub-buyer. *B* then becomes insolvent, and the bill is subsequently dishonoured. *A* is entitled to exercise his lien in respect of the goods which remain in his godown (*l*).

(*j*) *Bloxam v. Sanders*, 4 B. & C. 941.
(*k*) *Bunney v. Poyntz* (1833) 4 B. & Ad.
568.

(*l*) *Miles v. Gorton* (1833) 3 L. J.
Ex. 155; *Grice v. Richardson*
(1877) 3 App. Cas. 319.

Insolvent.—A person is said to be insolvent who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not [s. 2 (8)]. The seller is not entitled to treat the buyer as insolvent merely because he is in some *temporary* embarrassment. It must appear from his admission or by other sufficient proof that he is unable to pay the price in due or reasonable time, and therefore does not expect or intend to pay (m).

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Seller's lien against subsequent buyer.—See sec. 53 below and notes thereto.

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Part delivery.

Part delivery.—The unpaid seller may exercise his right of lien, after a part delivery, over the remainder of the goods, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien. Such an agreement will be implied where the delivery of part is made under such circumstances as to operate as a delivery of the whole. *Generally* a delivery of part of the goods sold is not equivalent to a delivery of the whole so as to destroy the seller's lien (n).

Where the buyer of a parcel of hay took delivery of part thereof *with the seller's permission*, it was held not to be a delivery of the whole (o). But where the goods sold were lying at a wharf, and a delivery order for all the goods was given to the buyer, and the buyer after weighing the whole took possession of part at the wharf, it was held that the part delivery operated as a delivery of the whole so as to destroy the seller's lien, and the seller was not entitled to countermand the delivery order after the part delivery was made (p).

Part delivery under instalment contract.—Where the goods are deliverable by instalments which are to be *separately* paid for, the seller cannot retain the instalments paid for by reason of the non-payment of the price of the residue of the goods, though he may, on the buyer's insolvency, retain any instalment unpaid for till he is paid the price of that and of any other instalment previously delivered, as his lien revives by implication of law (q). A agrees to sell goods to B by five monthly instalments,

(m) *Re Phoenix Bessemer Steel Co.*
(1876) 4 Ch. Div. 108.

(n) *Kemp v. Falk* (1882) 7 App. Cas.
573, at p. 583.

(o) *Bunney v. Poyntz* (1883) 3 B. & Ad.

568.

(p) *Hammond v. Anderson* (1803) 1
B. & P., N. R. 69.

(q) *Benjamin on Sale*, 6th ed., p.
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payment to be made by cash in fourteen days from the date of each delivery. The first three instalments are delivered and paid for. The fourth instalment is delivered but not paid for. *B* then becomes insolvent. *A* is entitled to retain the fifth instalment till he has been paid for *both* the fourth and the fifth instalments (*r*). Suppose the third instalment was paid for but not delivered, can *A* retain that instalment? No; he must deliver it, though *B* is insolvent (*s*).

49. (1) The unpaid seller of goods
Termination of lien. loses his lien thereon—

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods;
- (c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Don
Termination of lien.—This section deals with the termination of the lien of the unpaid seller. The lien is lost in any of the three cases mentioned in the section. These cases may be considered in order.

1. Delivery to carrier.—“The ordinary rule is that a delivery of the goods to a common carrier for conveyance [to the buyer] is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the seller's lien. The seller may, however, reserve the right of disposal of the goods, which he *prima facie* does when, on shipment, he takes a bill of lading making the goods deliverable to the order of himself, or of his agent. This reserves, not only the right of property, but also the possession, for such a delivery is not a delivery to the buyer, but to the captain of the vessel on behalf of the person indicated by the bill of lading, and it is by the indorsement and delivery only of the bill of lading that a symbolical delivery of the whole is effected” (*t*). Where the right of disposal is reserved, and the buyer becomes insolvent while the goods are in transit, the right of lien becomes changed into a right of stoppage in transit.

(*r*) *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289.

(*s*) *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (1877) 5 Ch.

Div. 205.

(*t*) *Benjamin on Sale*, 6th ed., p. 964.
See also s. 23 (2) and s. 25 (2).

2. Lawful possession by buyer.—The second case is where possession has been lawfully obtained by the buyer. The word “lawfully” means “not tortiously.”

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The lien is lost by delivery of the goods to the buyer. No delivery, however, is necessary where the goods are at the time of the contract of sale actually in the possession of the buyer as agent or bailee of the seller. In such a case the mere completion of the contract operates as a delivery of possession (u).

3. Waiver.—The third case is where the lien is lost by waiver. The lien may be waived expressly or by implication.

First, as to express waiver.—Where the contract of sale provides in express terms that the seller shall not be entitled to retain possession until payment of the price, the case is one of express waiver.

Next, as to implied waiver.—The lien is waived by implication—

- (1) when goods have been sold on credit, during the currency of the credit ; but the lien revives on the expiry of the credit ;
- (2) when the seller takes a bill for the price payable at a future day, during the currency of the bill ; but the lien revives if the bill is dishonoured ;
- (3) if the seller assents to a sub-sale ;
- (4) if the seller parts with the documents of title so as to exclude his title by estoppel under the provisions of sec. 27 above ;
- (5) if the seller wrongfully refuses to deliver the goods, such a refusal being a repudiation of the contract.

Stoppage in transit.

50. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

Right of stoppage in transit.

Stoppage in transit.—This is the second of the three rights of an unpaid seller (s. 46). This right consists in stopping the goods while they are in the possession of a carrier, or lodged at any place in the course of transmission to the buyer, and on resuming possession thereof, and retaining them until the price is tendered or paid. In order that the right to

(u) Benjamin on Sale, 6th ed., p. 986.

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stop goods in transit may be exercised, the following conditions must all be satisfied :—The seller must be unpaid; the buyer must be insolvent (see notes under s. 47); the seller must have parted with the possession of the goods; and the buyer must not have acquired it. This last condition, as we shall see under sec. 51, is that which is shortly expressed by saying that the goods are in transit.

51. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

Sub-sec. (1): duration of transit.—"In all cases of stoppage *in transitu*, it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitus* begins. When the goods have arrived at their destination *and* have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end" (v). The goods need not be in motion. If the goods are lodged at any place in the course of transmission to the buyer, *e.g.*, with a forwarding agent, they are as much in transit as if they were actually moving (w). "The essence of stoppage *in transitu* is that the goods should be in the possession of a middleman or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them" (x). The mere arrival of the goods at their destination is not sufficient to defeat the seller's right of stoppage. The transit continues until the buyer takes delivery of the goods from the carrier.

Illustrations.

(a) *B*, living at Madras, orders goods of *A*, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to *C*, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of *C*, are in transit.

(b) *B*, at Delhi, orders goods of *A*, at Calcutta. *A* consigns and forwards the goods to *B* at Delhi. On arrival there, they are taken to the warehouse of *B*, and left there. *B* refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c) *B*, a merchant of Bombay, orders goods of *A*, a merchant of Calcutta, to be delivered at a named station in Bombay. *A* delivers the goods to a railway company for conveyance to Bombay. *B* endorses and delivers the railway receipt to *C*. On arrival of the goods at the station *C* pays the freight and loads the goods in his carts. The transit is at an end, though the carts may not have left the goods yard of the railway station (y).

Sub-sec. (2): Anticipation by buyer of end of transit.—If the buyer or the agent appointed by him to take delivery obtains delivery of the goods, with or without the consent of the carrier (z), *before* their arrival at the place to which under the contract the goods are to be consigned, the transit is at an end. The effect of this sub-section is that the buyer may

(v) Per Cave, J. in *Bethell v. Clark*, 19 Q. B. D. at p. 561.

(w) Blackburn on Sale, p. 244.

(z) Per Lord Cairns in *Schotsmans v. Lancashire and Yorkshire Railway*

Co. (1867) L. R. 2 Ch. App. 332, at p. 338.

(y) *G. I. P. Ry. Co. v. Hanmandas* (1889) 14 Bom. 59.

(z) *Whitehead v. Anderson*, 9 M. & W. at p. 534.

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anticipate the end of the transit, and thus put an end to the seller's right of stoppage in transit. The buyer may under this sub-section "obtain delivery" of the goods by the carrier's attornment to him *before* the arrival of the goods at the appointed destination (a). Sub-sec. (3) provides for the case of the carrier's attornment *after* the arrival of the goods at the appointed destination.

Sub-sec. (3): Attornment by carrier to buyer.—This sub-section provides that if, after the arrival of the goods at the place to which under the contract the goods are to be consigned, the carrier expressly or by implication enters into a *new agreement*, distinct from the original contract for carriage, to hold the goods for the buyer, not for the purpose of expediting them to the place of *original* destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to a new or further order to be given to him, the transit is at an end. It is immaterial that the goods are to be conveyed from the original destination to a further destination to which the buyer may wish to consign them.

Illustration.

B, who lives at Poona, orders goods of *A* at Bombay. *A* sends them to Poona by *C*, a carrier appointed by *B*. The goods arrive at Poona and are placed by *C*, at *B*'s request, in *C*'s warehouse. The goods are held by *C* no longer as carrier, but as warehouseman or bailee for *B*, and they are no longer in transit. [Note that there is no significance in the fact that *C* was appointed as his carrier by *B*. *C*'s capacity, whether he was appointed by *A* or *B*, is that of a carrier, and it continues to be so until he attorns to *B*.]

Sub-sec. (5): Delivery on ship chartered by buyer.—Whether a vessel chartered by the buyer is to be considered his own ship, depends on the charter-party. If the charterer is the owner for the voyage, that is, if the ship has been demised to him and he has employed the captain, so that the captain is his servant, then a delivery on board of such a ship would be a delivery to the buyer [see ill. (a) below]. But though there is in such a case an actual delivery to the buyer's agent, the seller may annex terms to such delivery, and so prevent it from being absolute and irrevocable; he may, in other words, preserve his right of stoppage in transit by taking bills of lading, making the goods deliverable to his order or assign. This the seller may also do even if the buyer sends *his own* ship as in the illustrations given below. In fact, there is little difference for the present purposes between the buyer sending his own ship and his sending a ship demised to him under a charter party.

If the owner of the vessel chartered by the buyer has his own captain and crew on board, so that the captain is the servant of the owner, and the

(a) Benjamin on Sale, 6th ed., p. 1038.

effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the seller of goods on board is not a delivery to the buyer, but to an agent for carriage (b).

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Illustrations.

(a) *B*, a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(b) *B*, a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. *A* delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to *A*'s order or assigns. The cotton arrives at London, but, before coming into *B*'s possession, *B* becomes insolvent. The cotton has not been paid for. *A* may stop the cotton.

Sub-sec. (6): Wrongful refusal by carrier to deliver.—If the carrier wrongfully refuses to deliver the goods to the buyer, the transit is at an end, but not if he does so rightfully.

Sub-sec. (7): Part delivery.—Generally delivery of part is not equivalent to delivery of the whole. The burden of proof lies on the party who alleges the contrary. Delivery of an essential part of a machine has been held to operate as a delivery of the whole (c).

Wrongful delivery by carrier.—Any tortious act of the carrier after the goods are "at home" (that is, have arrived at the place of destination), such as delivery to a person purporting to claim under the unpaid seller's authority, but not having authority in fact, cannot defeat the buyer's right (d). Nor, on the other hand, does a mistaken or otherwise wrongful delivery of goods by the carrier after notice to stop in transit defeat the right of the unpaid vendor (e).

Public wharves.—Public wharves in India are governed by local Port Trust Acts (f).

52. (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given

How stoppage in transit is effected.

(b) Benjamin on Sale, 6th ed., p. 1018; *Schotsmans v. Lancashire and Yorkshire Railway Company* (1867) L. R. 2 Ch. App. 332 at pp. 335, 336.

(c) *Ex parte Cooper* (1879) 11 Ch. D. 68.

(d) *Bird v. Brown* (1850) 4 Ex. 786; *Lilladhar v. George Wreford* (1892) 17 Bom. 62.

(e) *Lill v. Cowley* (1816) 7 Taunt. 169.

(f) See *Lilladhar v. George Wreford* (1892) 17 Bom. 62.

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either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

Duty of carrier on stoppage.—The carrier is bound after notice of stoppage to re-deliver the goods to the seller. If he refuses to do so, he is guilty of conversion (g).

Transfer by buyer and seller.

53. (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Effect of sub-sale or
pledge by buyer.

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Effect of sub-sale or pledge by buyer on lien and stoppage.—Suppose the buyer, without paying the whole of the price, sells the goods

(g) *Jackson v. Nicoll* (1839) 5 Bing. N.C. 508.

or pledges them to another person. Does the sub-sale or pledge affect the unpaid seller's right of lien or stoppage in transit, and, if so, to what extent? The present section affords an answer to this question.

Sub-sec. (1).—Sub-sec. (1) says that neither the right of lien nor the right of stoppage is affected by a sub-sale or pledge by the buyer, unless the seller has assented thereto. The assent must be such an assent as in the circumstances shows that the seller intends to *renounce his rights* against the goods. It is not enough to show that the fact of the sub-sale or pledge has been brought to his notice and that he has assented to it merely in the sense of acknowledging the receipt of the information (h). This sub-section, however, has to be read along with the proviso.

Proviso.—The proviso to sub-sec. (1) contemplates the case where the seller has issued or lawfully transferred a *document of title to goods*, e.g., a bill of lading or a railway receipt [s. 2 (4)] to a person as buyer, and the buyer transfers the document by way of sale or pledge to a person who takes the document in good faith and for consideration. In such a case the proviso says that if the transfer was by way of *sale*, the unpaid seller's right of lien or stoppage is *defeated*, and if it was by way of *pledge*, his right of lien or stoppage *can only be exercised subject to the rights of the pledgees*.

Consideration.—The pledge may be to secure an advance made *specifically* upon the document of title, or it may be to secure an *antecedent* debt. In this respect the law as laid down in the present section differs from that which was laid down in sec. 103 of the Indian Contract Act. Under that section a transfer of a document of title by way of pledge prevailed over the unpaid seller's rights only if the transfer was made to secure an advance made *specifically* upon it. A document of title given to secure an *antecedent* debt was not effectual against the unpaid seller. In this respect sec. 103 adopted the decision of the Judicial Committee in *Rodger v. Comptoir d'Escompte de Paris* (i). But in *Leask v. Scott* (j), the Court of Appeal in England dissented from this decision. It was held in that case that a transfer of a document by way of pledge to secure a debt, though antecedent, prevails over the rights of an unpaid seller. The Court observed that there was no principle or authority to support the novel distinctions introduced by the Judicial Committee. The antecedent debt may be a debt due upon a general balance of account between the buyer and the pledgee or it may be any other existing debt due from the buyer to the pledgee. The word used in the present section is "consideration," and an antecedent debt would be "consideration" within the meaning of the section. The result is that under the law as contained in the present section a transfer of a document of title by way of pledge to secure a balance of account, or any other existing

(h) *Mordaunt Brothers v. British Oil and Cake Mills* [1910] 2 K.B. 502. | (i) (1868) L.R. 2 P. C. 393.
(j) (1877) 2 Q.B.D. 376.

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debt, will prevail over the rights of an unpaid seller. But the facts connected with the transfer must show that it was *agreed* that such debt should be the consideration (k). The pledge of a document of title specifically for a definite sum does not of itself and without any *agreement* entitle the pledgee to hold the goods against the unpaid seller in respect of the pledgee's general balance of account against the buyer, even if the pledgee is the buyer's factor (l). See illustrations below.

In good faith.—The transfer of a document of title, in order to affect the unpaid seller's right, must be to a person who takes it "in good faith." A thing is to be deemed to be done "in good faith" if it is in fact done honestly, whether it is done negligently or not (m). Mere notice of the fact that the goods have not been paid for does not negative good faith, for a man may be perfectly honest in buying or in taking a pledge of goods which he knows have not been paid for. But he cannot be said to be acting in good faith if he has notice of such facts as render the document of title *not fairly and honestly transferable* (n), e.g., notice that the buyer is insolvent (o).

Illustrations.

(a) *A* sells and consigns certain goods to *B*, and sends him the bill of lading. *A* being still unpaid, *B* becomes insolvent, and, while the goods are in transit, assigns the bill of lading for cash to *C*, who is not aware of *B*'s insolvency. *A* cannot stop the goods in transit.

(b) *A* sells and consigns certain goods to *B*. *A* being still unpaid, *B* becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to *C*, who knows that *B* is insolvent. The assignment not being in good faith, *A* may still stop the goods in transit.

(c) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by *C*. *B* becomes insolvent, being indebted to *C* to the amount of 9,000 rupees including the Rs. 5,000. *A* is not entitled to stop the goods except on payment or tender to *C* of 5,000 rupees. He is not bound to pay or tender the balance of Rs. 4,000.

(d) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure the sum of 5,000 rupees due from him to *C*, upon a general balance of account. *B* becomes insolvent. *A* is not entitled to stop the goods in transit except on payment or tender to *C* of the 5,000 rupees.

(k) *Gleggy v. Bromley* [1912] 3 K.B. 474.

(l) *Spalding v. Ruding* (1843) 3 Beav. 376. Benjamin on Sale, 6th ed.,

p. 1065.

(m) General Clauses Act, 1897, s.3 (20).

(n) *Cuming v. Brown* (1808) 9 East. 506.

(o) *Vertue v. Jewell* (1814) 4 Camb. 31.

Sub-sec. (2).—This sub-section means that where the pledgee has other security besides the goods comprised in the document of title, the unpaid seller can call on him to resort to that security before resorting to the goods covered by the document of title (p).

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Railway receipt.—Note that a railway receipt is a document of title to goods (q). See sec. 2 (4).

54. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

Sale not generally
rescinded by lien or
stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

Re-sale by unpaid seller.—This section deals principally with re-sale by an unpaid seller who has exercised his right of lien, or has exercised the right of stoppage in transit and resumed possession of the goods.

Sub-sec. (1): sale not rescinded by lien or stoppage in transit.—To understand sub-sec. (1), we start with the fundamental proposition that in a contract for the sale of goods mere default on the part of the buyer

(p) *Re Westzinthus* (1833) 5 B. & Ad. 817.

(q) See *Ramdas v. Amerchand & Co.* (1916) 43 I. A. 164, 40 Bom. 630.

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in payment of the price does not entitle the seller to rescind the contract of sale unless the right to rescind is expressly reserved [sub-s. (4)]. Is the position altered if an unpaid seller has exercised his right of lien so as to entitle him to retain possession of the goods until payment of the price, or has exercised his right of stoppage in transit and thereby again secured his lien? Sub-sec. (1) says, No. A contract of sale, it says, is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit. His only remedy, it would seem, is to re-sell the goods as provided by sub-sec. (2) and claim damages arising out of the re-sale (r). These damages represent the difference between the contract price and the price realized at the re-sale.

Sub-sec (2): re-sale.—As regards the rights and remedies of an unpaid seller who has exercised his right of lien or stoppage in transit, Lord Blackburn expressed the opinion long ago “that, viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of re-sale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances” (s). He should before exercising the right of re-sale, give notice to the buyer of his intention to re-sell and thus give him an opportunity to pay for and take delivery of the goods. The notice should be given without unreasonable delay after the breach and the goods should be sold within a reasonable time after the notice, otherwise the seller will not be entitled to damages arising on the re-sale, but to damages as represented by the difference between the contract price and the market price *at the date of the breach* (t).

Sub-sec. (3). On a re-sale by the unpaid seller, the purchaser acquires a good title thereto as against the original buyer, even if no notice of re-sale has been given to him. This is as it should be, for the original buyer being in default, is not entitled to the possession of the goods, and therefore cannot sue to recover the goods or their value.

Sub-sec. (4): express reservation of right of re-sale.—A *re-sale* by the seller, where a right of re-sale is expressly reserved in a contract of sale, has the effect of rescinding the contract, but it does not prejudice any claim which the seller may have for damages against the buyer. Stated briefly, the *exercise* of an expressly reserved power of re-sale rescinds the contract of sale in which the power is contained.

A common type of cases in which an express right of re-sale is reserved is afforded by what are called contracts of “*indents*.” These indents are

(r) The decision in *Baldeo Doss v. Howe* (1880) 6 Cal. 64, does not seem to be good law.

(s) *Kemp v. Falk* (1882) 7 Appl. Cas.

573, 581.

(t) *Prag Narain v. Mul Chand* (1897) 19 All. 535.

as a rule in printed forms, and almost every indent contains a clause that on default on the part of the buyer to pay for and take delivery of the goods within a specified time the seller should be at liberty to re-sell the goods, and that the buyer should pay all loss arising on the re-sale with interest. In such cases the seller is entitled to re-sell the goods on default on the part of the buyer, *even if the property in the goods has not passed to the buyer*, and to sue the buyer for the loss on re-sale (u). But it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated for the purposes of the contract. If there has been no such appropriation, there is nothing to which the power of re-sale under the contract could attach, and the seller is not entitled in such a case to the loss on re-sale, but to the difference between the contract price and the market price at the date of the breach (v). But it has been held that it is competent to the parties by an apt clause to provide for the exercise of the power of re-sale even if no goods are appropriated to the contract (w).

CHAPTER VI.

SUITS FOR BREACH OF THE CONTRACT.

55. (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

Suit for price.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Suits for breach of the contract.—This Chapter deals with suits for breach of a contract of sale. These are:—

- (1) a suit for the price by the seller against the buyer [s. 55];
- (2) a suit for damages by the seller against the buyer for non-acceptance of the goods [s. 56];
- (3) a suit for damages by the buyer against the seller for non-delivery of the goods [s. 57];

(u) *Moll Schutte & Co. v. Luchmi Chand* (1898) 25 Cal. 505, dissenting on this point from *Yule & Co. v. Mahomed Hossain* (1896) 24 Cal. 124; *Basdeo v. John Smidt* (1899)

22 All. 55, 65; *Best v. Haji Muhammad* (1898) 23 Mad. 18.

(v) *Angullia & Co. v. Sassoon & Co.* (1912) 39 Cal. 568.

(w) (1912) 39 Cal. 568, at p. 581.

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- (4) a suit for specific performance by the buyer against the seller [s. 58];
- (5) a suit by the buyer against the seller for breach of warranty [s. 59].

Suit for price.—Where under a contract of sale the property in the goods has passed to the buyer and the goods have actually come into his possession, the seller's only remedy is a suit for the price. Where the goods have not come into the actual possession of the buyer, the seller has the right of lien and stoppage in transit—dealt with in secs. 46 to 54 above.

Even if the property in the goods has not passed to the buyer, the seller may maintain an action for the price if the price is payable on a day certain irrespective of delivery; otherwise his only remedy is a suit for damages for non-acceptance of the goods under sec. 56 below.

Interest.—See sec. 61 below.

56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Damages for non-acceptance.

Damages for non-acceptance.—This section deals with a suit for damages by the seller. The next section deals with a suit for damages by the buyer.

The section says that where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance of the goods. The next section provides that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. Both these sections are silent as to the measure of damages, as that subject is dealt with in sec. 73 of the Indian Contract Act, to which the student is referred. It is unnecessary to repeat here what has been stated in the notes under that section. It is sufficient to state here the leading rules applicable to cases both under this and the following section (x). They are as follows:—

- (1) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market price *at the date of the breach*.
- (2) Where there is no such market, the measure of damages is the *estimated* loss directly and naturally resulting, in the ordinary course of events, from the breach of the contract. Thus if

(x) English Sale of Goods Act, ss. 50 and 51.

the exact sort of goods which the buyer has contracted for may not be obtainable, he may buy *similar* goods and may claim from the seller the difference in price (y). If no such purchase is made by the buyer, but the buyer has during the contract period settled contracts for the same kind of goods with other persons, the rates at which those contracts were settled may afford a basis for ascertaining the damages (z).

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

Damages for non-delivery.

Damages for non-delivery.—See notes under sec. 56 above.

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

Specific performance.—This section does not apply unless the goods are specific or ascertained. Thus a contract to supply all coal that may be required for the buyer's steel works is not a contract for specific or ascertained goods, and it cannot therefore be specifically enforced (a).

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

Remedy for breach of warranty.

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(y) *Hinde v. Liddell* (1875) L. R. 10 Q. B. 265.

(z) *Jaghmohandas v. Nusserwanji* (1902)

26 Bom. 744.

(a) *Dominion Coal Co. v. Dominion Iron & Steel Co.* [1909] A. C. 293.

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(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

Remedy for breach of warranty.—The distinction between a condition and a warranty has already been pointed out in sec. 12 above.

A breach of a condition, *e.g.*, a condition as to fitness (s. 16), entitles the buyer to treat the contract as repudiated and to reject the goods ; but he may elect to treat the breach of the condition as a breach of warranty in which case he is entitled to the remedy prescribed by the present section (s. 13). If the buyer has already accepted the goods, the breach of the condition can only be treated as a breach of a warranty [s. 13 (2)], and the buyer's remedy is that prescribed by the present section.

A breach of a warranty, as distinguished from a condition, does not entitle the buyer to reject the goods (s. 12), his only remedy is that prescribed by the present section. He may claim a deduction from the price if the loss occasioned by the breach of warranty is less than the price. He may refuse to pay the price altogether, if the loss equals the price. If the loss exceeds the price, he may not only refuse to pay the price, but also claim the excess. Or he may pay the price in all these cases, and sue the seller for damages for the breach of warranty.

Measure of damages for breach of warranty.—The section is silent as to the measure of damages for breach of warranty, presumably because the Legislature thought damages would be governed by the provisions of sec. 73 of the Indian Contract Act. On that footing the measure of damages would be the loss or damage directly and naturally resulting in the usual course of things from the breach of warranty (b). In a case in England the plaintiff bought of the defendant who was a coach-builder a pole for his carriage. The pole broke and the horses became frightened and were injured to the extent of £130. The price of a new pole was £3. It was held that the plaintiff was entitled to recover the £3 and also the £130 (c).

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

Repudiation of contract before due date.

(b) As to the English law, see the Sale of Goods Act, 1893, s. 53 (2), (3).

(c) *Randall v. Nweson* (1877) 2 Q. B. D. 102.

Repudiation of contract before due date: anticipatory breach.—This section reproduces the rule laid down in *Frost v. Knight* (d). The law on the subject was thus stated by Cockburn, C.J., in that case:—

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“The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damage.”

Anticipatory breach and measure of damages.—The measure of damages is not affected by the date of the buyer's refusal to accept. It is fixed by the difference between the contract price and the market price on the day when they ought to have been delivered or accepted (e), as the case may be, or on the several days if the delivery was to be by instalments, the fundamental principle being that the plaintiff is to be put, as near as may be, in the same condition as if the contract had been performed. Thus if *A* agrees in January, 1931, to sell and deliver goods to *B* on the 31st August, 1931, and, on the 10th June, 1931, *B* intimates to *A* that he will not pay for and take delivery of the goods, and *A* treats the repudiation as an immediate breach of the contract, *A* may at once sue *B* for damages for the breach. But the measure of damages is not fixed by the difference between the contract price and the market price on the 10th June, 1931, but by the difference between the contract price and the market price on the 15th August, 1931. If the goods were to be delivered by instalments at the end of the three months of August, September and October, the measure of damages is the sum of the differences between the contract price and the market price of the several instalments on the respective final days of performance (f). The same rules apply where the seller, before the due date, has refused to carry out the contract (g).

(d) (1872) L. R. 7 Ex. 111, at pp. 112, 113.

(e) *Phillips v. Evans* (1839) 5 M. & W. 475.

(f) *Brown v. Muller* (1872) L. R. 7

Ex. 319.

(g) *Roper v. Johnson* (1873) L. R. C. P. 167; *Krishna Jute Mills Co. v. Innes* (1911) 21 Mad. L. J. 182.

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If either party accepts the repudiation of the other as an immediate breach, he must act reasonably by way of minimising the loss caused thereby. As stated in sec. 73 of the Indian Contract Act, "in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account." Thus if the contract is for delivery in May, and the *buyer* repudiates the contract in April, the seller will not be justified in holding back the goods on a falling market, and thus enhancing the damages, if he could have sold them at a higher price in April (*h*). Conversely, if the repudiation is by the *seller*, the buyer has no right to wait on a rising market and claim damages for the increased price in May, if he could have bought against the contract at a lower price in April (*i*). In either case the party must act in a reasonable way to mitigate the effects of the breach.

Where the contract is one for the manufacture and delivery of goods, e.g., chairs, and it is repudiated by the buyer before the due date, the measure of damages is ordinarily the difference between the contract price and the cost of production and of delivery, that is to say, the seller's profit (*j*).

Anticipatory breach and waiver of condition.—The wrongful repudiation of a contract by one party may operate as a waiver of conditions precedent to be performed by the other. The leading case on the subject is *Braithwaite v. Foreign Hardwood Co.* (*k*). In that case the plaintiff agreed to sell rosewood to the defendants to be delivered by instalments and paid for by cash against bills of lading. The defendants, repudiated the contract before the first instalment arrived. On its arrival the plaintiff tendered the bill of lading, but the defendants repeated their refusal, and the plaintiff resold the goods. The plaintiff similarly tendered the second instalment, but this also was refused by the defendants, and resold by the plaintiff. The defendants subsequently discovered that the first instalment was inferior to the contract quality. The plaintiff sued for non-acceptance of the goods. The defendants contended as to the first instalment, that it was not according to the contract. It was held that the defendants had by repudiating the contract waived the performance of the conditions by the plaintiff and that the plaintiff was entitled to recover the difference between the contract price and the price realized at the resale in respect of both instalments. This case has been supposed to imply that a party repudiating for one reason cannot afterwards justify his repudiation on any other ground. This is incorrect, for giving a reason should not place him in a worse position than a party who gives no reason and can justify his repudiation on any ground (*l*).

(*h*) *Roth v. Tayson* (1896) 1 Com. Cas. 306.

(*i*) *Nickoll v. Ashton* [1900] 2 Q. B. 298, 305.

(*j*) *Cori v. Ambergate Railway Co.*

(1851) 17 Q. B. 127.

(*k*) [1905] 2 K. B. 543.

(*l*) *British & Bennington Ltd. v. N. W. Oachar Tea Co.* (1923) A. C. 48.

The Privy Council have accordingly held that a party repudiating is entitled to justify his repudiation on any ground which existed at the time when he repudiated (m).

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61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case whereby law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price—

- (a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable ;
- (b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made.

Interest.—This section saves the right which a party may have to recover interest or special damages, or to recover money on failure of consideration. At the same time it lays down rules as regards interest to provide for two specific cases which constantly arise in practice. This was necessary in view of the conflict of decisions on the subject.

Interest in suit for price.—If under a contract of sale the seller tenders the goods to the buyer, and the buyer wrongfully refuses to accept and pay for them, the Court may award interest on the price from the date of the tender. If the price is payable on a day certain irrespective of delivery, interest will run from that day, and if the goods are sold on credit, interest will run from the expiry of the credit.

Interest in suit for refund of price.—If the buyer pays the price, and the seller fails to deliver the goods, the buyer is entitled in a suit for a refund of the price to interest from the date of payment of the price. This supersedes a recent Full Bench ruling of the Madras High Court.

Interest on damages.—Under the English common law no interest can be recovered on damages (n). The same rule, it would seem, applies in India (o).

(m) *Nune Sivayya v. Maddu Ranganayakulu* (1935) 62 I.A. 89, 58 Mad. 670, 37 Bom. L.R. 538, 154 I.C. 1097, ('35) A.P.C. 67.

(n) See *London, C. & D. Ry. Co. v. South Eastern Railway Co.* [1893]

A.C. 429, and per Lindley, L.J., same case in Court of Appeal [1892] 1 Ch. at p. 140.

(o) See *Jamal v. Molla Dawood Sons & Co.* (1916) 43 Cal. 493, 503, 43 I.A. 6, 11.

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Special damages.—Where the breach of a contract has occasioned a special loss *which was actually in contemplation of the parties at the time of entering into the contract*, the party who suffers by the breach is entitled to special damages (p). This case is covered by the latter part of the first paragraph of sec. 73 of the Indian Contract Act. The best instance is ill. (j) to that section.

Failure of consideration.—Money paid under a contract of sale, when the consideration on which it was paid has failed, can be recovered as money had and received. On this principle the buyer is entitled to recover the price paid to the seller if it turns out that the seller had no title to the property (s. 14), as where the goods sold were stolen goods (g), or the goods sold are not of the contract description (s. 15), or there has been a breach of a condition as to quality or fitness (s. 16).

CHAPTER VII.

MISCELLANEOUS.

62. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

Exclusion of implied terms and conditions.—This section provides that any right or liability arising under a contract of sale by implication of law may be negatived or varied by express agreement. As observed by Lord Blackburn, "there is no rule of law to prevent parties from making any bargain they please" (r). Thus the conditions and warranties implied under secs. 14 to 17 may be negatived or varied by express agreement. And so the rules as to the passing of property under secs. 20 to 24. The law as to the importing of implied conditions into contracts of sale is somewhat difficult. It is explained by Atkin, L.J., in a luminous judgment in *Tournier v. National Provincial Bank* (s).

Usage of trade.—See Indian Evidence Act, 1872, sec. 92 (5), which is in effect the English law on the subject (t).

As regards a person who is *ignorant* of the existence of a usage of trade, the usage may control the mode of performance of the contract, but cannot change its *intrinsic character*. Thus if a person employs a *broker* to buy

(p) *Hydraulic Engineering Co. v. Mc Haffie* (1878) 4 Q.B.D. 670, 677.

(g) *Rowland v. Divall* [1923] 2 K.B. 500.

(r) *Calcutta Co. v. De Matto* (1863)

32 L.J. Q.B. 322, 329.

(s) [1924] 1 K.B. 461, 483.

(t) See *Hutton v. Warren* (1836) 1 M. & W. 466, 475.

goods on his behalf, and the broker, instead of buying the goods on account of his principal as a broker should do, buys the goods on his own account and sends them to his principal, the principal is not bound to accept them, even though there is a usage of trade allowing the broker to do so, if the principal was not aware of the usage. It is the duty of a person employed as a broker to establish privity of contract between his principal and the seller of goods, and it is a breach of the duty if he converts himself into a principal as, indeed, he does by buying the goods on his own account. This alters the intrinsic character of the contract, which the law would not allow as against a person who is ignorant of the usage (u).

63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Reasonable time. a question of fact. Reasonable time.—The effect of the rule laid down in this section is that in contracts for the sale of goods the question what is a reasonable time is a question of fact.

Auction sale.

64. In the case of a sale by auction—

- (1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid;
- (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction;
- (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;

(u) *Robinson v. Mollett* (1875) L.R. 7 H.L. 802.

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(5) the sale may be notified to be subject to a reserved or upset price ;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Auction sales.—This section lays down the rules as to sales by auction.

Upset price.—"Upset price" is the Scottish equivalent of "reserved price." The words "or upset" in sub-sec. (5) seem to have crept in at the last moment by some mistake. They ought to have been omitted.

Reserve price.—A combination among intending bidders to stifle competition, that is, not to bid against each other, is not unlawful. The seller can protect himself by a reserve bid (v).

Where the sale is subject to a reserve price, every bid is a proposal conditional on the reserve price having been reached ; the fall of the hammer is likewise conditional (w).

Repeal.

65. Chapter VII of the Indian Contract Act, 1872, is hereby repealed.

Savings.

66. (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or
- (e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

(v) *Rawlings v. General Trading Co.* [1921] 1 K.B. 635. | (w) *McManus v. Fortescue* [1907] K.B. 1.

THE INDIAN PARTNERSHIP ACT, 1932

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THE INDIAN PARTNERSHIP ACT

(ACT IX OF 1932)

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE
8TH APRIL, 1932.)

An Act to define and amend the law relating to partnership.

WHEREAS it is expedient to define and amend the law relating to partnership; It is hereby enacted as follows:—

CHAPTER I.

Preliminary.

1. (1) This Act may be called the Indian Partnership Act, 1932. S. 1
Short title, extent and commencement.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of October 1932, except Section 69, which shall come into force on the 1st day of October, 1933.

Law of Partnership.—Before the Indian Partnership Act, 1932, the law of partnership was dealt with in Chapter XI of the Indian Contract Act, 1872. The present Act makes considerable changes in definition and arrangement; gives effect (but short of making the firm a legal person) to the mercantile view of a firm's continuity, and adds provisions for voluntary registration of firms. The law relating to the insolvency of partners and its effect upon partnership has been altered.

Act not exhaustive.—The Act purports merely to define and amend the law relating to partnership, and expressly states that "nothing in this Act or any repeal effected thereby shall affect or be deemed to affect any rule of law not inconsistent with this Act" (a).

Act not retrospective.—The Act is not retrospective and applies only to anything done or suffered after the commencement of the Act (b).

(a) Sec. 74 (f).

| (b) Sec. 74 (a) to (c).

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Insolvency.—In spite of the fact that the Act has dealt with the effect of insolvency upon dissolution of partnership, it does not affect any rule of insolvency relating to partnership (c).

2. In this Act, unless there is anything repugnant in the subject or context,—
Definitions.

- (a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;
- (b) “business” includes every trade, occupation and profession ;
- (c) “prescribed” means prescribed by rules made under this Act ;
- (d) “third party” used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and
- (e) expressions used but not defined in this Act, and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

Sub-sec. (a) : “Act of a firm.”—The relations of partners to third parties are generally dealt with in Chapter IV of the Act. An “act of a firm” may be illustrated by examples. *A, B and C* are partners. *A* on behalf of the firm enters into a contract with a third party. If the third party commits a breach of the contract, the firm may sue to enforce the contract. On the other hand, if the firm commits a breach of the contract, the third party would be entitled to hold the firm liable for the consequences. The contract between *A* on behalf of the firm and the third party would be an act of the firm (d). An admission falling under sec. 23 ; a wrongful act under sec. 26 ; a misappropriation under sec. 27 ; or the case of wilful default in the ordinary course of business, falls within the definition of an “act of a firm.”

Sub-sec. (b) ; Business.—“Business” has a more extensive meaning than “trade” (e). In *Smith v. Anderson* (f) Jessel, M.R., said : “There are many things which in common colloquial English would not be called a Business, when carried on by a single person, which would be so called when carried on by a number of persons. For instance, a man who is the owner of a house divided into several floors and used for commercial purposes, e.g., offices, would not be said to carry on a business because he let the offices

(c) Sec. 74 (e).

(d) See Sec. 22.

(e) *Harris v. Amery* (1886) 35 L.J.C.P. at p. 92.

(f) (1880) 15 Ch. D. 247, 260-261.

as such. But suppose a Company was formed for the purpose of buying a building, or leasing a house, to be divided into offices and to be let out, should not we say, if that was the object of the Company that the Company was carrying on business for the purpose of letting offices? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. When you come to an Association or Company, formed for a purpose, you would say at once that it is a business, because there you have that from which you would infer continuity. So in the ordinary case of investments, a man who has money to invest, the object being to obtain his income, invests his money, and he may occasionally sell the investments and buy others, but he is not carrying on a business."

The definition of "business" is not exhaustive. "Business" would include a single commercial adventure (g).

Sub-sec. (c) : Prescribed.—Under sec. 71 the Governor General in Council and the Local Governments are empowered to make rules for the purposes mentioned in that section.

Sub-sec. (d) : Third party.—Any one who is not a partner is, in relation to a firm, a third party, *e.g.*, a creditor; a debtor a transferee of a partner's share (h); or a minor who has been admitted to the benefits of partnership (i).

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

Application of provisions of Act IX of 1872.

CHAPTER II.

The Nature of Partnership.

4. "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Definition of "partnership," "partner," "firm" and "firm name."

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm," and the name under which their business is carried on is called the "firm name."

(g) *Re Abenheim* (1913) 109 L.T. at p. 220. | (h) Sec. 29.
(i) Sec. 30.

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Definition of Partnership.—Sec. 239 of the Indian Contract Act defined partnership as follows :—

“ ‘Partnership’ is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.”

The amendments made are little more than verbal and make no change in what is essential to the constitution of a partnership. The definition in sec. 4 contains three elements—

- (1) there must be an agreement entered into by all the persons concerned ;
- (2) the agreement must be to share the profits of a business ; and
- (3) the business must be carried on by all or any of the persons concerned, acting for all.

(1) **There must be an agreement.**—This element relates to the voluntary contractual nature of partnership, as distinguished from non-contractual partnership relations, such as a joint Hindu family. The question whether there is or there is not an agreement is to be answered by reference to the provisions of the Indian Contract Act (j). A joint Hindu family partnership is not governed by the provisions of this Act. The rights and liabilities of the co-parceners must be considered with regard to the general rules of Hindu Law. In the case, however, of a partnership composed of certain individual members of a joint Hindu family and others who are strangers to the family, the relations of the parties are governed by the provisions of this Act, and not by any rules of joint Hindu family (k). The fact that the manager of a joint Hindu family has entered into a contract of partnership does not make other members of the family members of the partnership (l).

Minors.—See notes to sec. 30.

(2) **Sharing of profits of business.**—“Profits” is not defined in the Act, but it means the excess of returns over outlay, that is, net profits. “Business” includes every trade, occupation and profession (m). Co-ownership of land does not constitute a partnership between the co-owners, but the co-owners may work the land in partnership (n). As common interest will not make a partnership without division of profits, so sharing profits will not unless there is a common business. The business of course must be lawful. An occupation discouraged by law, though not punishable,

(j) See sec. 3. As to who are competent to contract, see s. 11 of Indian Contract Act.

(k) *Pichappa Chettiar v. Chockalingam Chettiar* (1934) 67 M.L.J. 366, 36 Bom. L.R. 976, 150 I.C. 802, ('34) A.P.C. 192; *Kanhaya Lal v. Devi Dayal* ('36) A.L. 514.

(l) *Gangayya v. Venkatramiah* (1918) 41 Mad. 454; *Kharidhar, Kapra Co., Ltd. v. Daya Kishan* (1921) 43 All. 116.

(m) Sec. 2 (b). See notes to sec. 2 (b).

(n) *Chettyar Firm v. Chettyar Firm* ('33) A.R. 120, 144 I.C. 1007.

may be unlawful, *e.g.*, a firm of bookmakers (*o*). The agreement to share profits is essential, but it should be noted that an agreement to share the losses is not essential. Where nothing is said as to the sharing of losses, it is implied in a partnership deed (*p*). It may, however, be agreed that as between the partners anyone or more of them shall not be liable for losses (*q*). The essential motive in making a partnership agreement is the making of profit and this has been clearly brought out in the definition.

Illustrations.

(1) *A* agrees with *B* to carry passengers by car from Bombay to Poona on the following terms: *B* is to pay to *A* Rs. 15 per mile per annum, and *A* and *B* are to share the expenses of repairing and replacing the cars, and to divide equally the money received for conveying passengers. *A* and *B* are partners (*r*).

(2) *A* and *B* are co-owners of a house let to a paying tenant. *A* and *B* divide the net rents between themselves. *A* and *B* are not partners, because letting a house is not a business (*s*). There is no partnership without combination to carry on a business and therefore the mere fact that persons own in common something which produces returns, and divide those returns according to their respective interests, does not make them partners. Now, if *A* and *B* used the house as an hotel managed by themselves or their agent for their common profit, they would be partners in the business of hotel keeping.

(3) *A* and *B* buy 100 bales of cotton, which they agree to sell for their joint account. *A* and *B* are partners in respect of such cotton (*t*).

(4) *A* and *B* buy 100 bales of cotton, agreeing to share it between them. *A* and *B* are not partners (*u*).

(5) *A* agrees with *B*, a goldsmith, to buy and furnish gold to *B*, to be worked up by him and sold, and that they shall share in the resulting profit or loss. *A* and *B* are partners (*v*).

(6) *A* and *B* agree to work together as carpenters, but that *A* shall receive all profits and shall pay wages to *B*. *A* and *B* are not partners (*w*).

(7) *A* and *B* are joint owners of a ship. This circumstance does not make them partners (*x*).

(*o*) *O'Connor v. Ralston* (1920) 3 K.B. 451.

(*p*) Sec. 13 (*b*).

(*q*) *Raghunandan v. Hormasji* (1927) 51 Bom. 342, 29 Bom. L.R. 207, 100 I. C. 1025, (27) A.B. 187.

(*r*) *Green v. Beesley* (1835) 2 Bing. N. C. 108.

(*s*) But letting furnished lodgings is business. See Pollock's Digest of the Law of Partnership, 12th Ed., P. 3, fn. (*d*).

(*t*) Ill. (a) to sec. 239 of Indian Contract Act.

(*u*) Ill. (b) to sec. 239 of Indian Contract Act.

(*v*) Ill. (c) to sec. 239 of Indian Contract Act.

(*w*) Ill. (d) to sec. 239 of Indian Contract Act.

(*x*) Ill. (e) to sec. 239 of Indian Contract Act.

- S. 4 (3) Carried on by all or any of the persons concerned, acting for all.—The fundamental principle of a partnership is that partners when carrying on the business of the firm are agents as well as principals.

Illustration.

A, B and C carry on business as partners. An outsider, *D*, deals with the firm through *C*. As between *C* and *D*, *C* is a principal. *C* is also the agent of *A* and *B*. Therefore *A, B* and *C* can all sue, and be sued by, *D*. Further, because *C* is in this transaction an agent of *A* and *B*, he is accountable to them.

“The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view” (y). The question whether a person is a partner or not depends in nearly all cases upon whether he has the authority to act for those who are admittedly partners, and whether those admittedly partners have the authority to act for him. In *Cox v. Hickman* (z) the creditors of a trader entered into an arrangement with him by which the trade was to be conducted under their superintendence, and they were gradually to be paid off out of the profits. These creditors may have agreed to take a share of the profits, and may even have supervised the business, but they did not become partners, because the business was not carried on on their behalf;—“the real ground of the liability is that the trade has been carried on by persons acting on his behalf” (a). The test of liability, therefore, is not merely whether there is a participation or sharing of profits, but whether there is such a sharing of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.

Acting for all.—The other partners are bound by the act of one only when the act is in the course of business. Whether an act is or is not done for carrying on in the usual way business of the kind carried on by the firm, depends upon the nature of the business and the practice of persons engaged in it (b).

Partners.—Persons who have entered into partnership with one another are called individually “partners.”

Firm.—Persons who have entered into partnership with one another are called collectively “a firm”. By the current usage of affairs, a firm is distinct from its members. They may have claims on the firm’s property, but it is not theirs. It has separate accounts, and is their debtor and creditor.

(y) Per Lord Wensleydale in *Cox v. Hickman* (1860) 8 H. L. C. 268, 312. This is expressly recognized in sec. 18.
(z) (1860) 8 H. L. C. 268.

(a) *Cox v. Hickman* (1860) 8 H. L. C. 268, 306.

(b) *Mara v. Browne* (1896) 1 Ch. 199; *Baird’s case* (1870) 5 Ch. 725, 733.

Although in the commercial sense "a firm" has a distinct meaning, yet both according to English and according to Indian Law, a firm is not a legal entity. A firm is merely a collective name for the individuals, who have entered into partnership. As a firm is not a legal entity, there cannot be a partnership of firms, but when two firms combine, the legal effect is that the individuals in the two firms become partners (c).

Illustration.

A, B and C are partners in X & Co., and D, E and F are partners in Y & Co. Both X & Co. and Y & Co., combine and form Z & Co. The partners in Z & Co. will be A, B, C, D, E and F. The result is that unless there is a contract to the contrary, the firm of Z & Co., would be dissolved by the death of any one of the partners, e.g., D.

Under the Code of Civil Procedure, 1908, Order XXX, suits may be brought by and against partners in the name of the firm, but this is only a matter of procedure. In the above illustration *A, B and C* may give notice for dissolution of the firm of *Z & Co.* and the suit for dissolution and accounts may be filed by *X & Co.*, and after a declaration has been made under Order XXX, the suit will proceed as one by *A, B and C (d)*.

Firm name.—The name under which the business of the partners is carried on is called the "firm name." A firm name shall not contain any of the following words, namely, "Crown", "Emperor", "Empress", "Empire", "Imperial", "King", "Queen", "Royal" or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except when the Governor-General in Council signifies his consent to the use of such words as part of the firm name by order in writing under the hand of one of the Secretaries of the Government of India (e). Otherwise, there are no prescribed forms for the style of a firm, and the liberty of partners to assume any firm name they please is bounded only by the general rules as to goodwill and trade-names. A firm name may be personal or impersonal, singular or plural, and need not contain the name of any existing partner. "*X & Co., "X, Y & Z," "The X, Co., "X & Son," "X's Sons," "X Brothers"* and other varieties, are alike usual and allowed. "Individuals may carry on business under any name and style they may choose to adopt" (f), provided they do not adopt a name tending to mislead the public into confusing them with others already trading under the same or like names. The Court will not interfere merely because the similarity may be an occasion for careless people to make mistakes. Lord Justice Knight Bruce said in a celebrated judgment: "All the Queen's

- (c) *Seodayal v. Joharmal* (1923) 50 Cal. 549; *Muhammad Abdul v. Sheikh Ismail* ('34) A. M. 9, 148 I. C. 1137.
(d) *Ram Singh v. Ram Chand-Tirath*

- Ram* ('36) A. L. 78, 157 I. C. 1113.
(e) Sec. 58 (3).
(f) *Erle, C. J., Maughan v. Sharpe* (1864) 17 C.B.N.S., at p. 492.

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4, 6 subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers" (g). Where fraudulent intention is shown, it is not a sufficient answer for the defendant to say that the name he is using in business is the name he has adopted for all purposes; freedom of choice does not extend to choosing just that name which will enable one to appropriate the reputation of another man's goods (h).

5. The relation of partnership arises from contract and
Partnership not created by status. not from status ;

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

Contract and status.—When a person agrees with another to share the profits of a business, to be carried on by them together, the partnership arising from such agreement is said to be the outcome of contract. If, however, as in a joint Hindu family, a person becomes entitled to a share in the family business by the mere fact that he is either born or adopted in the family, he is not a partner within the meaning of the Partnership Act, but a joint owner of the business. The joint ownership so created is not a partnership arising out of a *contract*, but merely a family quasi-partnership created by the operation of law. Two Hindu joint families cannot unite to constitute a partnership but their managing members may become partners, each having rights and duties with reference to their respective families (i).

6. In determining whether a group of persons is or is not
Mode of determining existence of partnership. a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the

(g) *Burgess v. Burgess* (1853) 3 D. M. & G. 896, 903.

(h) *Pinet et Cie v. Maison Louis Pinet* (1898) 1 Ch. 179.

(i) *Udai Chand v. Than Singh* (1935) 62 Cal. 586, 157 I. C. 937, (35) A. C. 537.

earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business ;

and, in particular, the receipt of such share or payment—

- (a) by a lender of money to persons engaged or about to engage in any business,
- (b) by a servant or agent as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

Determining existence of partnership.—In *Ross v. Parkyns* (j) Jessel, M. R., stated the law as follows : “ It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership. But it is now settled by the cases of *Cox v. Hickman* (k), *Buller v. Sharp* (l), and *Mollwo, March & Co. v. Court of Wards* (m), that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive.” The law as stated above has been restated in this section. The section also indicates the manner in which the general principle is to be applied to particular circumstances. The question whether the relation of partnership does or does not exist, “ must depend on the real intention and contract of the parties ” (n).

Explanation I.—The mere fact that a person is entitled to a share in the profits does not make him a partner, because the real relationship may be one of debtor and creditor.

Illustrations.

(1) A Rajah entered into a contract with a partnership firm as follows. The Rajah was to receive in consideration of advances a commission on the net profits of the partnership business. Large powers of control over the business were given to him for his protection, but no power to direct transactions. It was held that the contract was not of partnership but of loan and security

(j) (1875) L. R. 20 Eq. 331, 335.

(k) (1860) 8 H. L. C. 268.

(l) (1865) L. R. 1 C. P. 86, Ex. Ch.

(m) (1872) L. R. 4 P. C. 419; Sup. Vol. I. A. 86.

(n) *Mollwo, March & Co. v. Court of Wards* (1872) Sup. Vol. I. A. 86.

S. 6 between a debtor and a creditor: *Mollwo March & Co. v. Court of Wards* (1872) Sup. Vol. I. A. 86.

(2) *A* does in his own name the business of loading and unloading waggons for a limited company. *A* appoints *B* to manage the business. It is agreed between them that *B* shall get a 12 annas share out of the net profits as remuneration, and that *A* shall get a 4 annas share but shall not be liable for any loss. The relationship is of principal and agent: *Munshi Abdul Latiff v. Gopeswar Chatteraj* (1932) 56 Cal. L. J. 172.

The legal existence of a partnership has to be determined from all the facts. A statement in a document that nothing therein contained is to constitute the relationship of partners, will not necessarily prevent the parties from being partners in the eyes of the law. So too, a mere statement that the parties are to be partners will not necessarily constitute them partners in law (o). Further, although a person may hold himself out to be a partner and be liable to third parties accordingly, yet it does not necessarily follow that he is a partner in law (p). In *Mollwo, March & Co. v. Court of Wards* their Lordships said: "If cases should occur where any persons, under the guise of such an arrangement (i.e., apparently a debtor and creditor arrangement), are really trading as principals, and putting forward as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character" (q).

Illustrations.

(1) *A* and *B* enter into a partnership for a fixed term. It is agreed that if either of them dies before the end of the term his representatives shall during the rest of the term receive the share of the profits he would have been entitled to if living. *A* dies, and his share of the profits is paid to his executors as provided by the agreement. The executors are not partners: *Holme v. Hammond* (1872) L. R. 7 Ex. 218.

(2) *A*, *B* and *C* enter into an agreement in writing, reciting that *A* and *B* have agreed to be partners, and have requested *C* to lend Rs. 1,00,000 to be invested in their firm. The agreement declares that the money is advanced by *C* to *A* and *B* by way of loan and such advance shall not be considered to make *C* a partner. By other clauses of the agreement *C* is entitled to inspect the books, to receive a copy of the annual account, to share profits in a fixed proportion, and has the option to dissolve the partnership and conduct the liquidation of the business in certain events. *C*'s capital is not to be withdrawn till the termination of the partnership. Under such an agreement *C* is a partner with *A* and *B*. *Ex parte Delhasse* (1877) 7 Ch. Div. 511.

(o) *Mamooji v. Tayebali* ('33) A. S. 210, 146 I. C. 730.

(p) *Raghunandan Nanu v. Hormasjee* (1927) 51 Bom. 342, 346-347, 29

Bom. L.R. 207, 100 I.C. 1025, ('27) A.B. 187.

(q) *Mollwo, March & Co. v. The Court of Wards* (1872) Sup. Vol. I.A. 86, 106.

(3) *A* and *B*, both of them attorneys-at-law, came to the following agreement. *B* "agreed to admit *A* as a partner" in his (*B*'s) firm. It was agreed that the partnership was to be for one year; that in lieu of his share of profits *A* was to receive Rs. 500 per month and was not to be responsible for any losses or liabilities of the firm; and on its termination he was to cease to have any interest in the firm and its property. The clients of the firm were informed by a general notice that *A* was "admitted into partnership." *A* and *B* are partners although *A* is entitled only to a fixed salary: *Raghunandan Nanu v. Hormasjee Bezorjee* (1927) 51 Bom. 342, 29 Bom. L.R. 207, 100 I.C. 1025, ('27) A.B. 187.

Referring to the facts of the above case and the argument that the above agreement did not constitute a partnership in law, because they did not agree to share the profits between them, *Marten, C.J.*, said as follows: "Partners can agree to share those profits in any way they like. They may agree to share them equally. They may also agree, in my opinion, that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned. In other words the defendant (*i.e.*, *A*) thus became a salaried partner which is an expression we are quite familiar with not only in England but also in Bombay" (*r*).

Explanation II.—This explanation deals with certain instances which commonly occur.

7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will."

Partnership at will.

Partnership at will.—This definition is inserted, as the phrase "partnership at will" is used in other sections, in particular sec. 43. The expression "partnership at will" has always been used in the law of partnership and has always had the same meaning as that stated in this section.

Where no provision has been made by contract.—The following provisions have been held inconsistent with a partnership at will; requirement of notice a certain time before retiring from the partnership (*s*); an option to dissolve the partnership, in special circumstances, on special terms (*t*). See notes to sec. 17 (*b*).

8. A person may become a partner with another person in particular adventures or undertakings.

Particular partnership.

Particular partnership.—This section was inserted to meet cases which are probably much more frequent in India than in England. Where persons enter into an agreement constituting a partnership limited to a

(*r*) *Raghunandan v. Hormasjee* (1927) 51 Bom. 342, at pp. 348-349, 29 Bom. L.R. 207, 100 I.C. 1025, ('27) A.B. 187.

(*s*) *Featherstonhaugh v. Fenwick* (1810) 17 Ves. 307, 11 R. R. 81.

(*t*) *Clark v. Leach* (1862) 32 Beav. 14.

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joint trading adventure, and goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure, the adventurers are liable as partners; but there is no such responsibility for goods purchased before the partnership agreement upon the credit of an individual adventurer, though they are afterwards brought into stock as his contribution to the joint adventure (u).

Where an adventure becomes illegal:—See notes to sec. 41 (b) proviso.

CHAPTER III.

Relations of Partners to One Another.

9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

General duties of partners.—There is no doubt that the obligation of acting with the utmost good faith is incidental to the nature of the partnership contract. In a transaction between partners for the sale and purchase of a share in the business, if one of them is better acquainted with the accounts than the other, it is his duty to disclose all material facts; but the party entitled to such disclosure may elect at any stage to waive his right to further information, even if he knows that there has been some concealment of facts which he has since discovered, and believes that other facts are still concealed (v).

Duty to indemnify for loss caused by fraud. 10. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

Fraud.—This section is mandatory and not subject to a contract to the contrary, so that there is no doubt that a partner cannot contract himself out of liability for fraud, as he may do in the case of wilful default (w). The innocent partners of a firm are liable to third parties for the fraud of one of them, but under this section they are entitled to proceed against the partner who has committed the fraud. For definition of "Fraud" see sec. 17 of the Indian Contract Act.

11. (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

(u) *Karmali v. Vora Karimji* (1915) 42 I. A. 48, 39 Bom. 261. | (v) *Law v. Law* (1905) 1 Ch. 140.
(w) See sec. 13 (f).

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

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(2) Notwithstanding anything contained in sec. 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Agreements in restraint of trade.

Variations by consent.—"Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business provided those additions or alterations be made with the unanimous concurrence of all the partners (x)." This section does not interfere with a judge's exercise of discretion under sec. 44, which will not be reviewed if not shown to be capricious or to disregard any legal principle (y).

Illustration.

A, B and C intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits shall be equally divided. Afterwards they carry on the partnership business for many years, *A*, receiving one half of the net profits, and the other half being divided equally between *B* and *C*. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits (z).

The conduct of the business.

12. Subject to contract between the partners—

- (a) every partner has a right to take part in the conduct of the business ;
- (b) every partner is bound to attend diligently to his duties in the conduct of the business ;
- (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and
- (d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

(x) Per Lord Langdale, *M. R., England v. Curling* (1844) 8 Beav. 129, 133.
(y) *Rehmat-un-Nissa Begam v. Price*

(1917) 45 I.A. 61, 42 Bom. 380.
(z) See Repealed sec. 252 of Indian Contract Act.

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Sub-secs. (a), (b) : Right and duty of partners to attend to business.—It is quite common in practice to provide by express agreement that this or that partner need not, and sometimes even that he may not, take any active part in the business, and also for the payment of salary to a managing or acting partner. Any such salary will of course rank, in taking accounts as between the partners, as a debt from the firm. Refusal and neglect on the part of any one partner to perform his duties gives to the other partner, on whom the whole conduct of the business is thrown, a right to compensation (a).

Sub-sec. (c) : Power of majority.—This power though not in itself of a judicial kind, is subject to the rule of natural justice which governs quasi-judicial powers of private persons and bodies in general. Every partner must have an opportunity of being heard, and the decision must be made in good faith with a view to the collective interest of the firm. (b). Being so made, it is conclusive, as in other analogous cases.

Not only the nature of the business, but the place where it is carried on, may not be varied without the consent of all the partners.

Power of majority to expel partner.—See notes to sec. 33.

Sub-sec. (d) : Right of access to books.—A partner may inspect the books of the firm, and make extracts therefrom. This, however, does not give him any privilege to use those extracts for purposes hostile or injurious to the firm after he has ceased to be a partner (c). A partner may employ an agent, who is not objectionable, to inspect the books on his behalf (d).

Mutual rights and liabilities.

13. Subject to contract between the partners—

- (a) a partner is not entitled to receive remuneration for taking part in the conduct of the business :
- (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;
- (c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;
- (d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum ;

(a) *Krishnamachariar v. Sankara Sah*
(1920) 22 Bom. L. R. 1343, 57
I. C. 713, (21) A. P. C. 91.

525.

(c) *Trego v. Hunt* (1896) A. C. 7, 26.

(b) *Const v. Harris* (1823) T. & R. 496,

(d) *Bevan v. Webb* (1901) 2 Ch. 59.

- (e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him— S. 13
- (i) in the ordinary and proper conduct of the business, and
- (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and
- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

Sub-sec. (a) : Remuneration.—This sub-section does not touch the case of undue labour and trouble being imposed on one partner by another's wilful neglect of the business to which he ought to attend. A partner on whom the whole conduct of the business has been thrown in this manner is entitled to compensation (e).

Sub-sec. (b) : Share in profits and losses.—As this sub-section lays down a presumption in the case of partners as to equality of shares, the burden of proof lies on the party who sets up a contract of the contrary (f). The contract to the contrary may even be that one of the partners is to have only a fixed salary (g). As regards the question of losses in business, it is perfectly open to partner A to say that as between himself and his partner B, the partner A shall bear all the losses of the business. This, of course, applies only as between themselves, for whatever their agreement may be, they would both be liable to third parties (h).

Sub-secs. (c), (d) : Interest on capital and advances.—Where a partner is entitled to interest on the capital, he will be paid interest only if there are profits. If, however, he advances moneys to the firm, he will be entitled to interest at 6 per cent. from the firm whether there are profits or not.

Sub-sec. (e) : Partner's right to indemnity and contribution.—In addition to the ordinary claim of an agent to be indemnified, a partner may be entitled to re-imbursement for what may be called emergency or salvage expenses incurred by him personally on behalf of the firm in circumstances of extraordinary requirement (i). Money payments to satisfy debts

- (e) *Krishnamachariar v. Sankarah Sah*
(1920) 22 Bom. L. R. 1343, 57
I. C. 713, (21) A. P. C. 91.
- (f) *Jadobram v. Bulloram* (1899) 26
Cal. 281.
- (g) *Raghunandan Nanu v. Hormasjee*

- Bezonjee* (1927) 51 Bom. 342, 29
Bom. L.R. 207, 100 I.C. 1025, (27)
A.B. 187.
- (h) *Raghunandan Nanu v. Hormasjee*
Bezonjee (1927) 51 Bom. 342,
348, *supra*.
- (i) See sec. 21.

Ss. 13, 14 of the firm are the commonest examples under this head. There may also be urgent and necessary payments required for keeping the business of the firm in existence as a going concern; thus in a mining business it may be necessary to sink a new shaft promptly to get at unexhausted minerals. There is no rule whereby the measure of the amount, which can be allowed as proper, is limited to the nominal capital of the concern (j).

“The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible” (k).

Sub-sec. (f): Wilful neglect and fraud.—In the case of wilful neglect, partners may contract with each other that they will not be liable to the firm for any loss caused to it by their wilful neglect in the conduct of the business of the firm. The case of fraud, however, stands on a different footing. A partner cannot contract himself out of his liability to the firm for any loss caused to it by his fraud. See notes to sec. 10.

The firm is liable to third persons for the wilful neglect or fraud of one of the partners, but under this section, the innocent partners are entitled to compensation from their partner for the loss caused to them by his wilful neglect.

14. Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

Partnership property.—Property belonging to the partners or to one of them, does not become partnership property merely by being used for the purposes of the business (l). It will become so only if the partners show an *intention* to make it so, as where the owner of a mill agrees to carry on the manufacture in partnership with others, and is credited in the accounts of the firm with the value of the mill and plant as his capital. If A and B

(j) *Mining Co.'s Case* (1853) 4 D. M. & G. 19, 42.

(k) *Lindley on Partnership*, 9th ed., p. 180.

(l) *Davis v. Davis* (1894) 1 Ch. 393;
Lachhman Das v. Mt. Gulab Devi
(1936) A. A. 270, 162 I.C. 143.

take a lease of a colliery for the purpose of working it in partnership, and do so work it, the lease is partnership property.

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Illustrations.

(1) *A* and *B* are partners. *A*, without the authority of *B*, buys railway shares in his own name with the moneys and on account of the firm. The shares are partnership property: *Ex parte Hinds* (1849) 3 De J. and Sm. 603.

(2) *A* and *B* are partners. *A* buys land with partnership moneys, for his sole benefit. Thereafter *A* debits himself in the firm books and becomes a debtor to the firm for the amount of the purchase money. The land is not partnership property, because there was clearly a contrary intention: *Smith v. Smith* (1800) 5 Ves. 189.

(3) *A* and *B* are partners. *A* buys land in his own name out of the profits of the partnership business. The land is partnership property, because there are no facts showing a contrary intention: *Nerot v. Burnard* (1827) 4 Russ. 247.

(4) *A*, *B* and *C* are partners. The partners buy a property in the name of a fictitious person with the moneys of the partnership. The legal and equitable interest in the property passes to all the three partners: *Wray v. Wray* (1905) 2 Ch. 349.

(5) *A* and *B*, partners, effect assurance on their lives for and on account of partnership and the premiums in respect of the assurance policies are paid out of the funds of the partnership. The policies form part of the partnership assets. *Re Adarji Mancherji Dalal* (1931) 55 Bom. 795, 133 I.C. 254, (29) A.B. 67.

It is competent to partners by an agreement between themselves to convert partnership property into the separate property of an individual partner and *vice versa* (*m*).

Goodwill.—"Goodwill" is properly a commercial term, signifying the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than the mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits; it may be summed up as "the whole advantage, whatever it may be, of the reputation and connection of the firm" (*n*). See secs. 36 and 55.

Valuation of goodwill.—See note "Valuation of goodwill" under sec. 55.

(*m*) *Bolton v. Puller* (1796) 1 Bos. & P. 539. Lindley on Partnership, 9th ed., pp. 422-426.

(*n*) *Trego v. Hunt* (1896) A. C. 7, 24; *Churton v. Douglas* (1858) Johns. 174. [Apart from the right to use the name of the firm, goodwill

involves a right to represent that you are carrying on the business of the firm, to solicit the customers of the old firm, to have the books of the firm, and to prevent anybody else from saying that he is carrying on the business; *Hill v. Fearis* (1905) 1 Ch. 466, 469 in *arguendo*].

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Partner's share.—A partner is not titled to any specific part of the partnership properties. His share is what he is entitled to claim on the termination of the partnership or would at any given time claim if the partnership had at that time to be wound up and its assets realized and distributed. A partner's share does not include advances made by him to the firm beyond his contributions of capital.

15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Application of the property of the firm.

If a partner uses the property of the firm for his own purposes, he will be liable to account to the firm for the profits, if any, that he may make. A contract of partnership is *uberrimae fidei*.

16. Subject to contract between the partners,—

Personal profits earned by partners.

- (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;
- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

Personal profits.—The section may be illustrated by the following illustrations :—

(1) *A, B and C* are partners in trade. *C*, without the knowledge of *A* and *B*, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. *A* and *B* are entitled to participate, if they please, in the benefit of the lease : *Featherstonhaugh v. Fenwick* (1810) 17 Ves. 298.

(2) *A, B and C* carry on business together in partnership as merchants trading between Bombay and London. *D*, a merchant in London to whom they make their consignments, secretly allows *C* a share of the commission which he receives upon such consignments in consideration of *C* using his influence to obtain the consignments for him. *C* is liable to account to the firm for the money so received by him.

Competing business.—One or more persons may, with the knowledge and consent of all parties, be members of two distinct firms carrying on as similar, if not a directly competing business, as where the two undertakings

are a morning and an evening newspaper. In such a case members of a firm *A* who also belong to firm *B* are not entitled, though a majority in *A*, to use *A*'s special information for the purposes of *B* (o).

17. Subject to contract between the partners—

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be ;

Rights and duties of partners after a change in the firm.

(b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

after the expiry of the term of the firm, and

(c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

where additional undertakings are carried out.

This section gives general rules for the determination of the rights and duties of the partners after the happening of events which would otherwise leave these rights and duties undetermined. Sub-sec. (a) covers cases where there has been a change in the firm. Sub-sec. (b) provides for the case where the original term fixed has expired ; and sub-sec. (c) provides for the case where a firm formed for particular undertakings proceeds to carry out other undertakings.

Sub-sec. (a) : Change in the firm.—This sub-section would cover the case of a new partner introduced into the firm. A new partner, however, may not be bound by a special term of which he had no notice (p).

Sub-sec. (b) : Extension of partnership.—The continuance of business without liquidating the partnership affairs is presumed to be a continuance of the partnership. Where the partnership is continued after the expiry of the period fixed by the partnership agreement, such terms of the partnership agreement as are consistent with a partnership at will remain applicable, but such terms as are inconsistent with a partnership at will cease to be applicable.

(o) *Glassington v. Thwaites* (1823) 1 S. & St. 124. | (p) *Austen v. Boys* (1857) 24 Beav. 598, 606.

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✓ The following provisions have been held to be consistent with the incidents of a partnership at will :—

- (1) option for a surviving partner to purchase a deceased partner's share at a fixed valuation (*q*) ;
- (2) an arbitration clause (*r*) ; and
- (3) a power to nominate a successor (*s*).

The following provisions, on the other hand, have been held inconsistent with a partnership at will :—

- (1) requirement of notice a certain time before retiring from the partnership (*t*) ; and
- (2) option to dissolve the partnership, in special circumstances, on special terms (*u*).

Sub-sec. (c): Additional undertakings.—This sub-section contemplates a case in which the partners are the same, but there are further or other undertakings than those for which the partnership was originally formed.

CHAPTER IV.

Relations of Partners to third parties.

✓ **18.** Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Partner to be agent of the firm. Partner is agent.—In the leading case of *Cox v. Hickman* (*v*) Lord Wensleydale laid down the law as follows : “ A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, *each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent*, who was to give the whole of the profits to his employer.” In other words, a partner transacts business for himself as principal, and also as an agent for the

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| (<i>q</i>) <i>Cox v. Willoughby</i> (1880) 13 Ch. D. 863. | (<i>t</i>) <i>Featherstonhaugh v. Fenwick</i> (1810) 17 Ves. 307, 11 R. R. 81. |
| (<i>r</i>) <i>Gillett v. Thornton</i> (1880) 13 Ch. D. 863. | (<i>u</i>) <i>Clark v. Leach</i> (1862) 32 Beav. 14. |
| (<i>s</i>) <i>Cuffe v. Murlagh</i> (1881) 7 L. R. Ir. 411. | (<i>v</i>) <i>Cox v. Hickman</i> (1860) 8 H. L. C. 268, 312. |

other partners. One of the tests of partnership is whether there was a binding contract of mutual agency between the partners (*w*). See note "Carried on by all or any of the persons concerned, acting for all," under sec. 4.

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The converse does not follow. There is no general presumption that the firm is the agent of the partners. Payment to the firm is no discharge of a separate debt to one partner, unless it is proved that the firm had authority to receive payment for him (*x*).

19. (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

Implied authority of partner as agent of the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

- (a) submit a dispute relating to the business of the firm to arbitration,
- (b) open a banking account on behalf of the firm in his own name,
- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immovable property on behalf of the firm,
- (g) transfer immovable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

"Implied authority."—"Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *praepositus negotus societatis*, and may consequently bind all the other partners by his acts in all matters which are within the

(*w*) *Janki Nath v. Dhokar Mal* ('35) A. P. 376, 156 I.C. 200.

(*x*) *Powell v. Broadhurst* (1901) 2 Ch. 160.

In the case of partnerships of a general commercial nature, a partner

(1) may accept, make, and issue bills (b) and other negotiable instruments in the name of the firm ;

(2) may borrow money on the credit of the firm ;

(3) may for that purpose pledge any goods or personal chattles belonging to the firm ; and

(4) may for the like purpose make an equitable mortgage by deposit of title deeds belonging to the firm.

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Sub-sec. (2): What a partner cannot do.—Sub-sec. (2) gives a list of acts which do not fall within a partner's implied authority, unless there is any usage or custom of trade to the contrary.

Usage or Custom.—The term "usage of trade" is to be understood as referring to a particular usage to be established by evidence (c). To prove such a usage, there needs not either the antiquity, the uniformity, or the notoriety of custom in its technical sense ; usage may still be in course of growth, and may require evidence for its support in each case (d).

"Custom of trade" refers to a general custom of merchants which has been ratified by decisions of Courts and adopted as settled law.

20. The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Extension and restriction of partner's implied authority.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Restriction of authority.—A third party is not affected by a secret limitation of a partner's implied authority, unless he has notice of it.

21. A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Partner's authority in an emergency.

See notes to sec. 13 (e).

(b) *Bunarsee Dass v. Gholam Hoossein*
(1870) 13 M.L.A. 358.

(c) Sec. 92 (5) of the Indian Evidence

Act, 1872.

(d) *Juggomohun Ghose v. Manickchand*
(1859) 7 M.L.A. 263, 282.

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22. In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Mode of doing act to bind firm.

Act binding firm.—A firm can only be bound by what is done on behalf of the firm; even if the firm has the use of money borrowed by a partner in his own name, this is at most evidence, but not conclusive, to show that the borrowing was in fact on account of the firm (e).

23. An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

Effect of admissions by a partner.

Partner's admissions.—A partner's admission is at most evidence against the firm; it is no more against himself (f). Of course a partner cannot increase his authority to bind the firm by any statement of his own about it (g).

24. Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Effect of notice to acting partner.

Notice to partner.—Notice to any habitually acting partner of anything relating to partnership affairs is generally notice to the firm. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings (h)."

25. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Liability of a partner for acts of the firm.

See notes to sec. 43 of the Indian Contract Act.

Under English law, the liability of partners on contracts is only a joint liability. See sec. 9 of the English Partnership Act, 1890.

Torts.—Both under English and under Indian Law, in the case of torts, partners are liable jointly and severally for wrongful acts committed by a

(e) *Ram Chandra v. Kasem Khan* (1924) 28 Cal. W.N. 824, 81 I. C. 513, ('25) A. C. 29.

(f) *Stead v. Salt* (1825) 3 Bing. at p. 103.

(g) *Ex parte Agace* (1792) 2 Cox 312.

(h) *Rampal Singh v. Balbhadar Singh* (1902) 25 All. 1, 17, 29 I. A. 203; *Morumal v. Gobindram* ('33) A. S. 176, 144 I. C. 452. Cf. sec. 3, Explanation III of the Transfer of Property Act, 1882.

partner acting in the ordinary course of the partnership business. The principle underlying this is that the other members hold him out to the world as a person for whom they are responsible (i).

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26. Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Liability of the firm
for wrongful acts of a
partner.

Ground of liability ; usage of firm, how material.—The principle of this section is a branch of the universal rule that everyone must answer for the acts and defaults of his servants or agents in the course of their employment. The chief difficulty that occurs in practice is that of knowing whether the neglect or fraud of a partner really took place “in the management of the business of the firm,” or was only his own particular wrong, for which his position in the firm gave him an opportunity (j). Where the default consists, as it usually does, in the misappropriation of money which a customer or client was minded to entrust to the firm, it is material to consider whether it ever came into the firm’s custody ; in this case the firm is liable for misappropriation by a partner, whether he was the partner originally trusted or not, and whether he acted in the exercise of apparently regular authority or not. Further, the question whether a partner was acting on behalf or with the ostensible authority of the firm can seldom be answered except by reference to the expectations created either by the special usage of that firm, or by what is usual in that kind of business generally. Depositing securities with a banker for safe custody will make his firm responsible for a misappropriation of them ; but putting money in the hands of one member of a banking firm to be invested at his discretion will not ; for the former transaction is within the scope of what bankers in England habitually do for their customers, the latter is outside it (k).

✓ In *Hamlyn v. Houston* (l) one of two partners without the knowledge of his co-partner, by bribery induced a clerk of the plaintiff, a competitor in trade, in breach of duty to his employer to divulge confidential information in regard to the plaintiff’s business. It was in the ordinary course of the business of the firm to obtain such information by legitimate methods, and the partner acted in the interests of the firm. Both partners were held liable to the plaintiff.

- (i) *Earl of Dundonald v. Masterman* (1869) L.R. 7 Eq. at p. 517.
(j) See *Munshi Basiruddin Mullick v. Surja Kumar Naik* (1908) 12 C. W. N. 716, 719.

- (k) Contrast *Clayton’s case* (1816) 1 Mer. 572, 579, with *Bishop v. Countess of Jersey* (1854) 2 Drew. 143.
(l) (1903) 1 K. B. 81.

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27, 28Liability of firm for
misapplication by
partners.**27. Where—**

- (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or
- (b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Difference between sub-secs. (a) and (b).—Under the first paragraph the receipt and misapplication of the money or property must be by the same partner; whereas under the second paragraph the firm receives money or property, and the money or property so received is misapplied by any of its members. In both cases the firm is liable to make good the loss.

28. (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

Holding out.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

"Holding out."—The creditor must in fact have given credit to the firm in the belief, induced by the express or tacit representation of the supposed partner that he is a member of the firm. Without such facts there is no ground for holding any one responsible. Any representation of this kind "can only conclude the defendants with respect to those who have altered their condition on the faith of its being true" (*m*). In fact, this kind of liability is neither more nor less than a special application of the principle of estoppel.

(*m*) *Quarman v. Burnett* (1840) 6 M.&W. at p. 509.

✓ "Where a man holds himself out as a partner, or allows others to do it he is then properly estopped from denying the character he has assumed and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel" (n).

"No evidence of intention or knowledge of the consequences of his acts and conduct is necessary to make the apparent parties liable" (o).

Proof of "holding out."—The creditor need not prove specifically that he gave credit to the firm on the faith of a certain person being a partner in it. Giving credit to a firm is the same thing as giving credit to all and each of the persons believed by the creditor to be its members. It is a question of fact in each case whether credit was given on the faith of the representation. In order to establish a liability under this section the creditor must prove that the person charged was acting as a partner and under sec. 109 of the Indian Evidence Act the onus is then on the firm to show that the apparent partner was not really a partner (p). But, when the representation and the creditor's knowledge of it are proved, the remaining inference is so easily drawn that the results will almost always be the same. As the liability depends on estoppel and not on any contract between the apparent partners, it is immaterial what the agreement between them, if any, may really be.

Knowingly permits himself to be represented.—This would seem on principle to be a particular case of leading another person to believe that one is a partner. There is nothing to show how much more than passive assent is signified by the "knowingly permits" of this section. It can hardly be the law that, if A hears a report that Z is representing him as a partner in X & Co., he becomes bound at his peril to notify to the world that he is not. But there is an amount of silence, in the face of known persistent representations made to persons likely to be misled, which may be good evidence of "knowingly permits himself to be represented." All that can be said in general terms is that prudent men will rather use a little abundant caution in due season than run the risk of much more trouble at a later time.

Deceased partner and retired partner.—In practice questions of this kind are suggested mainly by the case of a deceased or retired member's name being continued in the firm. Since the law does not require the name of a firm to correspond with the names of actual partners (q), the presence of a given name is of itself no representation that any person bearing that name is in fact a partner. It is accordingly well settled that the continuance of a deceased partner's name will not make his estate liable for partnership debts contracted after his death and this is enacted in sub-sec. (2). But

(n) *Mollwo, March & Co. v. Court of Wards* L. R. 4 P. C. at p. 435.

(o) *Porter v. Incell* (1905) 10 C. W. N. 313, 320.

(p) *Bharat Spinning and Weaving Co. v. Manilal* (1935) 37 Bom. L. R. 326, 157 I. C. 4, ('35) A. PC. 175.

(q) See note "Firm Name" under sec. 4.

S. 28 a living retired partner may be exposed to risk in this way, that customers of the firm who have no notice of his retirement by a change of style or otherwise may go on dealing with the firm on the faith of his being a member. Therefore it is prudent and usual to notify customers of changes in the constitution of the firm. No creditor, however, can hold a retired partner liable whom he did not know to be a partner before the change in the firm, and who had ceased to be a partner in fact when the credit was given. Thus a "dormant partner," i.e., one not generally known to be a partner, "may retire from a firm without giving notice to the world" (r).

Strictly speaking, it seems that in the case of a retiring partner the representation that he is still a member of the firm is not made by others and consented to by him, but is his own; for, much oftener than not, credit given on the faith of his being a partner is so given not because the other partners say anything, but because he has said nothing. Indeed, the presence of a particular name in the firm has very little to do with the matter, save so far as the disappearance of a personal name may be a warning that some member of that name has died or retired. A retired member of a firm with an impersonal name might be liable to a customer who had known him to be a member (t).

Not applicable to torts.—The doctrine of "holding out" does not apply to liability for civil wrongs, as it rests entirely on credit having been given to the person whom it is sought to make liable. One man is not answerable for another's wrongful acts merely because that other might be supposed to be his servant. Ostensible employment, if one may use the term, is material only so far as it tends to prove real employment (s).

Effect of holding out.—If a person holds himself out to be the partner of a firm, he becomes personally liable. He does not thereby become a partner in the firm; and is not entitled to any rights as against those who are in fact partners in the firm. By holding himself out to be a partner, he does not become the agent of the firm. He merely makes himself personally liable for the credit given to the firm on the faith of his representation.

Registration of firms and holding out.—Where the provisions of Chapter VII are made applicable cases of a person being liable on the ground that he has held himself out to be a partner will seldom occur. The Register will give information as to who are really partners; and though there is no duty to take inspection it is unlikely that a third person will act on a representation of partnership without such inspection; and if he does, no estoppel will arise, for the doctrine of estoppel does not apply, where the facts are known to both sides (u).

(r) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 177.

(s) See *Garler v. Vhalley* (1830) 1 B. & Ad. 11.

(t) *Smith v. Bailey* (1891) 2 Q. B. 403.

(u) *Mohori Bibee v. Dhurmodas Ghose* (1903) 30 I. A. 114.

Imp. 29. (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

✓ Share of partner.—See note "Partner's share" under sec. 14.

✓ Partner's dealing with his share.—The effect of the section is that a partner may transfer his share to a third person, absolutely or by way of security, but cannot make the transferee a partner, unless the other partners recognize the transferee as a partner (v). This section is subject to the terms of the partnership agreement, and if a partner has an unconditional right to transfer his share, he is relieved from liability by an actual transfer, although the transferee may be in insolvent circumstances (w).

✓ Specific performance.—Specific performance of a contract to sell a share in a partnership business may be enforced (x).

✓ Purchase of share by partner.—A transfer of his interest by one partner to another, where there are only two partners, operates as a dissolution (y). One of several partners may purchase the share of another for his own benefit, and not for the benefit of the firm (z).

✓ Power to introduce partners.—See notes to sec. 31.

✓ Dissolution of partnership.—Where a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, the Court may dissolve the firm (a).

✓ Transferee's right to account.—A receiver appointed at the instance of a transferee is in no better position than the transferee himself, and is not entitled to ask for accounts (a1). But the transferee of a partner's interest has, on dissolution or retirement from the firm of the transferor, a statutory

- (v) *Jefferys v. Smith* (1826) 3 Russ. 158.
- (w) *Jefferys v. Smith* (1826) 3 Russ. 158.
- (x) *Dodson v. Downey* (1901) 2 Ch. 620.
- (y) *Heath v. Sansom* (1832) 4 B. & Ad. 172.
- (z) *Cassels v. Stewart* (1881) 6 App.

- Cas. 64.
- (a) Sec. 44 (e).
- (a1) *Mistry Goa Petha v. N. H. Moos* (1931) 10 Pat. 792, 133 I.C. 40, (31) A.P. 312.

right to a judicial account and this is not affected by an arbitration clause in the partnership deed (b).

What transferee cannot do.—A transferee of a partner's interest is not entitled, during the continuance of the partnership,

- (1) to interfere in the conduct of the business ; or
- (2) to require accounts ; or
- (3) to inspect the books of the firm ; or
- (4) to challenge the account of profits agreed to by the partners.

Transferee's rights.—The transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner was entitled. For the purpose of ascertaining that share the transferee is entitled to an account as from the date of dissolution.

30. (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

Minors admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such

(b) *Bonnin v. Neame* (1910) 1 Ch. 732.

person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person asserting that fact.

(7) Where such person becomes a partner,—

- (a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and
- (b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

- (a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,
- (b) his share shall not be liable for any acts of the firm done after the date of the notice, and
- (c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

English law.—By the common law an infant may be a partner, though he cannot be sued for partnership debts while an infant, and the obligations contracted by him in the partnership, like any other contracts of an infant, are voidable at his election on attaining full age (c), and he cannot claim to share profits without submitting to a profit and loss account like any other partner, still less claim a return of, or in respect of, his share before there is a divisible surplus.

(c) *Goode v. Harrison* (1821) 3 B. & Ad. 147, 157.

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Indian law.—Even before the Indian Partnership Act was enacted, the law in India was that a minor could not make any contract at all, and therefore could not be a partner (d), and this has been recognised by express enactment in sec. 30 (1). The minor, however, “may be admitted to the benefits of partnership,” and his share in the firm’s property is subject to the firm’s debts. See sub-sec. (3). The section applies only where a minor is admitted to the benefits of a subsisting partnership, and is not in terms applicable to a case in which a person is the sole proprietor of a business (d1).

Accounts.—Before this Act, it was doubtful whether a minor could sue the partners for an account, but now by sub-sec. (4) it is settled that he is not entitled to sue for accounts or for payment of his share, except when severing his connection with the firm, during minority, and when, under sub-sec. (8) (c), after attaining majority he elects not to become a partner.

Rights and liabilities of minor in a firm.—The position of a minor in a firm may be stated as follows :—

Rights of Minor.

(1) May be admitted to the benefits of partnership. (Sub-sec. 1).

(2) Right to inspect and copy any of the accounts of the firm. (Sub-sec. 2).

(3) On severance he may sue for accounts. (Sub-sec. 4).

(4) On attaining majority may elect to become partner, and he will be entitled to the share to which he was entitled as a minor. (Sub-sec. 5).

(5) On attaining majority may elect not to become partner, in which case his share is not liable for any acts of the firm done after the date of the public notice that he has elected not to become a partner. (Sub-sec. 5).

Disabilities.

(1) May not be a partner. (Sub-sec. 1).

(2) May not sue for accounts unless he severs his connection with the firm. (Sub-sec. 4).

Liabilities.

(1) May have his share in the firm attached for the acts of the firm. (Sub-sec. 3).

(2) Unless within the period mentioned in sub-sec. (5), he elects not to become a partner, he will be liable as a partner. (Sub-sec. 5).

(3) Where a minor on attaining majority has elected to become a partner, he becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership. (Sub-sec. 7 (a)).

(4) After attaining majority, he may be liable for holding himself out as a partner. (Sub-sec. 9).

(d) *Sanyasi Oharan Mandal v. Krishnadhan Banerji* (1922) 49 I. A. 108, 49 Cal. 560, 67 I. C. 124.

(d1) *Lachmi Narain v. Beni Ram* (1931) 53 All. 479, 130 I. C. 704, ('31) A. A. 327.

CHAPTER V.

Incoming and outgoing partner.

31. (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

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Introduction of a partner.

(2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

Introduction of new partners.—Express power for a senior or principal partner to introduce one or more new partners, named or not named, under agreed conditions, is in fact constantly given by partnership articles. A person duly nominated under such a power acquires rights in the partnership property, which the Court will enforce by way of appropriate specific relief (e), though it cannot enforce an agreement to enter into partnership, because the foundation of partnership is mutual confidence, which the Court cannot supply where it does not exist.

An incoming partner is subject to the terms of the partnership, though he may not be bound by a special term of which he had no notice (f).

✓ **Liability of new partner.**—A new partner does not by the mere fact of his introduction into the firm become liable for any act of the firm done before he became a partner. Arrangements, however, for transferring debts from the members of an old firm to a new firm are not uncommon, and if assented to by the old creditors, may constitute a complete novation (g). Where the business is carried on continuously, the creditors knowing of the change, both the assumption of existing debts by the new partners and the assent of the creditors to accept them as debtors and to discharge the retiring partners will be rather easily inferred (h). But an agreement between the old partners and an incoming partner that he shall be liable for existing debts does not of itself make him liable to existing creditors of the firm (i). An incoming partner becomes liable for an existing debt where the following two conditions are fulfilled: (1) Where the new firm constituted by his introduction has agreed to take over the liability of the old firm, and (2) where the creditor has agreed to discharge the old firm, and to accept the new firm as his debtors.

(e) *Byrne v. Reid* (1902) 2 Ch. 735 C.A.

(f) *Austen v. Boys* (1857) 24 Beav. 598, 606.

(g) See notes to sec. 62 of Indian Contract Act.

(h) *Rolfe v. Flower* (1866) L. R. 1 P. C. 27, 40, 44; see sec. 32 (2).

(i) *Russa Engineering Works v. Kanara Transport Co.* (1926) 41 Mad. 930, 98 I. C. 257, (26) A. M. 1138.

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Retirement of a Partner.

32. (1) A partner may retire—

- (a) with the consent of all the other partners,
- (b) in accordance with an express agreement by the partners, or
- (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

✓ **Retirement of a partner.**—The word “retire” is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership between them. It does not cover the case of a partner who withdraws from a firm by dissolving it. This would be a dissolution and not retirement.

✓ **Three ways of retiring.**—A partner may retire—

- (1) where all the partners consent to his retirement ;
- (2) where it is part of the partnership agreement that a partner might retire without seeking a dissolution of the firm ; and
- (3) where the partnership is at will (j), by giving notice in writing to all the other partners of his intention to retire.

Novatio.—See notes “Liability of new partner,” under sec. 31.

(j) Section 7.

Illustration.

A, B and C are partners. *D* is their creditor. *A* retires, and a new partner *X* is introduced into the firm. *X* agrees to take over the liability of *A*. *D*, the creditor, agrees with *A*, and the reconstituted firm of *B, C* and *X*, that he will look only to the new firm for the payment of his debt. *A*, the retiring partner, is discharged from liability to *D*.

Unless, therefore, there is a novatio a partner who retires does not thereby cease to be liable for the firm's liabilities incurred before his retirement. A partner of a firm that has infringed a trade mark is liable even though he had retired before the suit for damages was filed. A partner remains liable for damages, though he may have retired before the institution of the suit (*k*). He remains liable until the partnership affairs are wound up, or such liabilities are discharged, and this is so although he may be only a sleeping partner (*l*).

Sub-sec. (3): Liability of retired partner.—A retired partner may be liable—

- (1) for debts incurred before retirement. See note "Novatio," *supra*; and
- (2) for debts incurred after retirement.

Sub-sec. (3) deals with debts incurred after retirement, whether the debt has been incurred by the retiring partner after retirement, or by the other partner (*m*).

Illustrations.

(1) *A, B* and *C* are partners. *C*, who is an active partner, retires without giving public notice of retirement. *A* and *B* in carrying on the old business incur a liability towards *X*. *C* is also liable to *X*.

(2) *A, B* and *C* are partners. *C*, who is an active partner, retires without giving public notice of his retirement. Thereafter, *C* has a business transaction with *X*, purporting to act on behalf of the firm from which he had retired. *A* and *B* are also liable to *X*.

Election.—Where a change is made in a partnership by the retirement of an old and the admission of a new member, a customer of the old partnership who, without notice of the change, supplies goods to the new firm, may elect to make either the partners of the old firm liable, or the partners of the new firm, but he cannot hold both the outgoing and the incoming partners liable.

Illustration.

A, B and *C* are partners. *C* retires and *A* and *B* take *D* into partnership, continuing the old firm name. A customer deals with the firm as newly

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| <p>(<i>k</i>) <i>Thomas Bear & Sons v. Rukia Ram</i>
(34) A. L. 625, 148 I. C. 763.</p> | <p>(<i>l</i>) <i>Court v. Berlin</i> (1897) 2 Q. B. 396 C. A.
(<i>m</i>) See sec. 45 (1).</p> |
|---|---|

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constituted without having notice of the change. He may elect to hold liable either *A, B* and *C*, or *A, B* and *D*, but he cannot sue *A, B, C* and *D*. Once he has elected to sue *A, B* and *C*, he cannot sue *A, B* and *D*, and vice versa : *Scarf v. Jardine* (1882) 7 App. Cas. 345.

Proviso.—"A dormant partner may retire from a firm without giving notice to the world" (*n*). The reason for this is that a sleeping partner, who has never been known to creditors as a partner, has never been given credit by third parties (*o*).

Illustration.

A, B and *C* are partners. *C* is a sleeping partner, who has not been known by creditors to be a partner of *A* and *B*. *C* retires without giving public notice of his retirement. *C* is not liable for subsequent debts incurred by *A* and *B*.

Sub-sec. (4) : Public notice.—Before this Act the law was that besides public notice to the general public actual notice should be given to old customers (*p*). This has been superseded by sub-sec. (3) which makes a public notice sufficient even as to old customers. As to what constitutes public notice, see sec. 72.

Public notice may be given either by the retired partner or by any partner of the reconstituted firm.

This sub-section does not, of course, exclude the effect of notice in fact by any other means.

33. (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

Sub-sec. (1) : Expulsion.—Power to expel a partner may be conferred by express agreement, but, even more than the ordinary powers of a majority, it must be exercised in good faith. Reasonable warning and opportunity of explanation must be given (*q*). An irregular expulsion being wholly inoperative, the person against whom it is directed does not cease to be a partner ;

(*n*) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 177.

(*o*) *Ramasami v. Kadar Bibi* (1886) 9 Mad. 492 ; *Greaves v. Parshotum* (1903) 5 Bom. L. R. 366 ; *Gorio v. Vallabhdas* (1915) 17

Bom. L. R. 762 on this point is no longer law.

(*p*) *Jwaladutt R. Pillani v. Bansilal Motilal* (1929) 56 I.A. 174, 53 Bom. 414, 31 Bom. L. R. 687, 115 I.C. 707, (29) A. P.C. 132.

(*q*) *Barnes v. Young* (1898) 1 Ch. 414.

he may claim reinstatement in his rights (r), and, not being legally deprived of anything, cannot sue for damages (s).

Under the repealed sec. 253 (9) of the Indian Contract Act, the Court had power to expel a partner, where the partnership was for a fixed term. There appears to be no such provision in this Act.

Sub-sec. (2): Liability after expulsion of partner.—The liability of the firm and of the expelled partner after expulsion is on the same footing as the liability of a firm and a retired partner after retirement (t).

34. (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Insolvency of partner.—Before the Act, the law in India with reference to the effect of the insolvency of a partner was different. The insolvency of a partner did not *per se* effect a dissolution of the firm nor did the insolvent partner cease to be a partner, but the other partner could sue for a dissolution (u). Under this section an insolvent partner ceases to be a partner on the date on which the order of adjudication is made. Unless there is a contract to the contrary, a further effect of the insolvency of a partner is that the firm is dissolved.

Furthermore, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent done after the date on which the order of adjudication is made.

✓ The consequences resulting from the insolvency of a partner are:—

- (1) The partner adjudicated an insolvent ceases to be a partner;
- (2) He ceases to be a partner on the *date* on which the order of adjudication is made;
- (3) The firm is dissolved on the *date* of the order of adjudication, unless there is a contract to the contrary;
- (4) The estate of the insolvent is not liable for any act of the firm after the *date* of the order of adjudication; and
- (5) The firm cannot be held liable for any acts of the insolvent partner after the *date* of the order of adjudication.

(r) *Blisset v. Daniel* (1853) 10 Ha. 493.

(s) *Wood v. Wood* (1874) L.R. 9 Ex. 190.

(t) See "Liability of retired partner" under sec. 32.

(u) Sec. 254 (2) of Indian Contract Act.

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35. Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

Liability of estate of deceased partner.

Liability of estate of deceased partner.—It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners. It is immaterial if the obligation was incurred towards a creditor who believed the deceased partner to be living and a member of the firm (*v*).

Where money is borrowed by surviving partners to pay for and take delivery of goods ordered by the firm in the life-time of the deceased partner, the estate of the deceased is not liable for the debt. All that the creditor is entitled to is a personal decree against the surviving partners and a decree against the partnership assets in the hands of those partners (*w*). If goods are ordered before, but not delivered till after the death of a partner, a suit for goods sold and delivered will not lie against the representatives of the deceased partner (*x*).

36. (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

Rights of outgoing partner to carry on competing business.

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in restraint of trade.

(v) *Neel Comul Mookerjee v. Bipro Dass* (1901) 28 Cal. 597; see sec. 28(2).
(w) *Seshi Ammal v. Vairavan Chettiar*

(1918) 35 Mad. L.J. 669, 47 I.C. 958.
(x) *Bagel v. Miller* (1903) 2 K.B. 212.

Outgoing partners.—A retired partner (y), an expelled partner (z), and a partner who has ceased to be a partner by virtue of an order of adjudication (a), fall within the meaning of an outgoing partner.

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Sub-sec. (1): Restrictions on outgoing partners.—This sub-section, while recognising the right of an outgoing partner to carry on a business, competing with that of the firm, and even to advertise such business, imposes certain restrictions on his activities in order to prevent unfair competition with the firm. The principle underlying the sub-section is that an outgoing partner has presumably received payment for the value of his share in the property of the firm, including the goodwill of the business, and he should therefore be regarded as having sold his share in the goodwill of the business to his fellow partners. He is, therefore, placed in the position of a person who sells the goodwill of his business to another (b). The restrictions imposed upon him are :—

- (1) he may not use the firm name ;
- (2) he may not represent himself as carrying on the business of the firm ; and
- (3) he may not solicit the custom of persons who were dealing with the firm before he ceased to be a partner (c).

The above restrictions are subject to a contract to the contrary.
Students' Contract Act under sec. 27.

Sub-sec. (2): Restraint of trade.—Agreements between partners of the kind recognized by this sub-section have been allowed in England ever since there has been any settled partnership law and are exceedingly common ; indeed, some such clause is rarely absent from partnership articles.

37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the

Right of outgoing partner in certain cases to share subsequent profits.

(y) Sec. 32.

(z) Sec. 33.

(a) Sec. 34. A partner on adjudication is to be deemed to be an outgoing partner only when the partnership agreement provides for the continuance of the business. Otherwise a dissolution would be effected.

(b) See sec. 55.

(c) The rule in *Walker v. Mottram* (1881) 19 Ch.D. 355, that where the Official Assignee has sold the goodwill of an insolvent's business, the insolvent is not debarred from soliciting old customers, must be deemed to be superseded by sec. 36, as it makes no difference in the case of a partner ceasing to be a partner on insolvency.

S. 37 property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Duties between continuing and outgoing partners.—Various and often complicated questions have arisen where a retiring or deceased partner's capital has been left in the firm's business without any settlement of accounts. This section has been enacted in accordance with the result of a long series of authorities (*d*). If there is no special agreement the outgoing partner or his representative may claim at his or their option "such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the firm", (but experience is not favourable to this method), or interest at the rate of six per cent. per annum on the amount of the share. If there is an agreement that the continuing partner shall take over the share of a deceased partner at a proper valuation, the representative of the deceased partner can insist that the purchase shall stand subject to correction of the valuation which is incident to the purchase (*e*). But if there is no such agreement and a continuing partner takes the share of a deceased partner at an undervalue, the representative of the deceased partner cannot compel him to retain it at a proper valuation. His proper remedy is to have the account settled on principles enacted in this section (*f*).

Forfeiture clause.—The due exercise by the continuing firm of an option (such as is often given by partnership articles) to buy out the share of the late partner excludes any further claim to an account of profits. The existence of such an option has no effect if it is not exercised in accordance with its terms. The surviving partners are not trustees for an outgoing partner or a deceased partner's representatives. Whatever is due on that account is a debt and nothing else than an ordinary debt, and as such it is subject to the ordinary law of limitation of actions (*g*).

(*d*) See *Ahmed Musaji v. Hashim Ebrahim* (1915) 42 I.A. 91, 42 Cal. 914, 28 I.C. 710.

(*e*) *Hordern v. Hordern* (1910) A.C. 465.

(*f*) *Sivagnanathammal v. Nallaperumal* (1934) 67 Mad. L. J. 880, 155 I.C. 783, (135) A.M. 165.

(*g*) *Knox v. Gye* (1872) L.R. 5 H.L. 656, 675.

Where surviving partner is a trustee.—Further and more complicated questions may arise if a continuing partner is personally responsible as executor or trustee to the persons beneficially interested in the late partner's share; his liability in that capacity must be carefully distinguished from that which he may incur simply as a partner. The principle is "that a trustee or executor who uses trust-money in trade must account for the profits which he makes by that use of it" (h).

38. A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Revocation of continuing guarantee by change in firm.

Continuing guarantee.—The agreement to the contrary required to displace the effect of this section must be clearly shown. It is not implied in the mere fact that the guarantee is given to a firm whose name has ceased to describe its existing members, and is to secure the balance of a current account (i). Such an intention may be apparent from other circumstances.

The one Indian decision reported on this section is in a plain case. *A* becomes surety to the firm of "N. C. Mookerji" for *B*'s conduct as cashier to the firm. The constitution of the firm is subsequently changed, and its name is altered to "N. Mookerji & Son." *A* is not liable for *B*'s defalcations subsequent to the change (j).

CHAPTER VI.

Dissolution of a firm.

39. The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm."

Dissolution of a firm.

The Act recognises the difference between a dissolution of the firm and a mere retirement of a partner. On dissolution each partner is paid his share of the profits, if any, whereas on the retirement, death or adjudication of one partner, a dissolution does not necessarily follow, for it may be a term in the partnership agreement that the firm should be continued by the other partners. A dissolution does not necessarily follow because the

(h) *Vyse v. Foster* (1874) L.R. 7 H.L. 318, 329.

(i) *Backhouse v. Hall* (1865) 6 B. & S.

509.

(j) *Neel Comul Mookerjee v. Bipro Dass* (1901) 28 Cal. 597.

Ss. 39-41 partnership has ceased to do business, for the partnership may continue for the purpose of realizing the assets (*k*).

40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Dissolution by agreement.

Dissolution.—A partner's refusal to advance money for partnership purposes is not evidence of a dissolution by consent or of an abandonment of his interest in the partnership (*l*). In the case last cited the Privy Council said that however precarious or speculative the subject-matter of a partnership may be such refusal was evidence too slender to justify an inference of abandonment or loss of interest by laches. But in a Madras case the inference of a dissolution was drawn when a partner ceased to do business (*m*).

41. A firm is dissolved—

Compulsory dissolution. (a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership:

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Sub-sec. (a) : Insolvency of partners.—This sub-section is based upon the obvious principle that there must be at least two persons to constitute a firm. As already seen, on adjudication a partner ceases to be a partner as from the date on which he is adjudicated an insolvent (*n*). Under sec. 42 (d), in the absence of a contract to the contrary the adjudication of a single partner operates as a dissolution of the firm. The case contemplated, however, by this section is where the whole firm is adjudged insolvent, or all the partners but one are adjudged insolvents. It is clear that under such circumstances, the firm is dissolved, there being no question of a contract to the contrary.

Sub-sec. (b) : Prohibition of business.—Where a partnership carrying on business in British territory is dissolved by one partner becoming an alien enemy, and the British partner continues to carry on the business,

(*k*) *Sathappa v. Subramaniam* ('27) A. P.O. 70, 53 Mad. L.J. 245, 101 I. C. 17; *Palkoomal v. Paramand* ('33) A.S. 121, 143 I. C. 900.

(*l*) *Maung Tha Huiin v. Mah Thein*

Myah (1900) 28 Cal. 53, 27 I.A. 189.

(*m*) *Sudarsanam v. Narasimhula* (1901) 25 Mad. 149, 164.

(*n*) Sec. 34.

the enemy partner is entitled to share the profits made after dissolution by the use of his capital, payment being of course suspended during the war (o).

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Proviso.—Trading with a particular country, for example, may very well be interrupted and forbidden by war, while trade with other countries is lawful and within the scope of the partnership.

Dissolution on the happening of certain contingencies.

42. Subject to contract between the partners, a firm is dissolved—

- (a) if constituted for a fixed term, by the expiry of that term ;
- (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;
- (c) by the death of a partner ; and
- (d) by the adjudication of a partner as an insolvent.

Subject to contract.—The provisions of sec. 41 are mandatory, while the present section lays down rules applicable where there is no contract to the contrary.

Sub-sec. (a): Partnership for fixed term.—Where a partnership has been entered into for a fixed term, the partnership is at the end of that term dissolved by the expiry of that term, without any further act or notice, except in cases provided for in sec. 17 (b). Under sec. 47 the authority of partners, however, continues for the purposes of winding up.

Where there is no express agreement to continue a partnership for a definite period there may be an implied agreement to do so (p). The burden of proving such an implied agreement is upon the person who alleges its existence (q), and the provisions relied on must be clearly inconsistent with the general right to dissolve (r).

Sub-sec. (b): Completion of adventure.—This sub-section refers to the dissolution of particular partnerships. For the definition of a particular partnership, see sec. 8.

Sub-sec. (c): Death of a partner.—It is often desirable, and in practice it is not uncommon to provide by agreement that the death of a partner shall not dissolve the contract as between others.

- (o) *High Stevenson & Sons v. Aktiengesellschaft fur Cartonnagen Industrie* (1918) A. C. 239.
- (p) *King v. Accumulative Assurance Co.* (1857) 3 C. B. N. S. 151.

- (q) *Burdon v. Barkus* (1862) 4 De. G. F. & J. 42.
- (r) *Baxter v. Plenderleath* (1824) 2 L. J. (O. S.) (Ch.) 119.

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Partners may agree (as they frequently do) that on the death of any of them his nominee or legal representative shall be entitled to take his place. In the case of a power to nominate a successor on death, it is necessary that there should be a specific direction in that behalf either in express terms, or, at any rate, by a specific disposal of the deceased partner's interest in the firm. The will of a deceased partner, making a general bequest of his property, does not operate as an exercise of such a power (s).

Sub-sec. (d) : Insolvency of a partner.—Under the Indian Contract Act, the adjudication of a partner did not operate as a dissolution. It was merely one ground on which dissolution could be sought by the other partners (t). Under the present section the insolvency of a partner operates as a dissolution of the firm, unless there is a contract to the contrary. The date of the dissolution would be the *date* on which the order of adjudication is made (u).

43. (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

Dissolution by notice
of partnership at will.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Partnership at will.—For definition see sec. 7.

Notice.—No particular formality is required, but the notice must be an unambiguous intimation of a final intention to dissolve the partnership (v). The writ and plaint in a suit for dissolution is sufficient notice of an intention to dissolve (w). The notice should be served on all the other partners. The notice once given cannot be withdrawn unless all the other partners consent (x). The fact that one of the partners receiving the notice is of unsound mind does not affect the validity of the notice (y).

Date of dissolution.—The dissolution takes effect from the date mentioned in the notice, or if no date is mentioned, as from the date of the communication of the notice.

(s) *Bachubai v. Shamji* (1885) 9 Bom. 536, 554.

(t) Sec. 254 (2).

(u) See sec. 34 (1).

(v) *Parsons v. Hayward* (1862) 4 De. G. F. & J. 474.

(w) *Sathappa v. Subramanian* (1927) 53 Mad. L. J. 245, 101 I. C. 17, (27) A. PC. 70.

(x) *Jones v. Lloyd* (1874) L. R. 18 Eg. 265, 271.

(y) *Robertson v. Lockie* (1846) 15 Sim. 285.

Imp.
Dissolution by the Court.

44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

- (a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;
- (b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;
- (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;
- (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;
- (e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner ;
- (f) that the business of the firm cannot be carried on save at a loss ; or
- (g) on any other ground which renders it just and equitable that the firm should be dissolved.

Sub-sec. (a) : **Insanity.**—Insanity does not dissolve the partnership *ipso facto* (z). It is now made clear that in the case of insanity, a next friend on behalf of the lunatic may sue for dissolution. The judge exercising

(z) *Jugal Chandra Bhattacharjee v. Gunny Hajee Ahmed* (1925) 53

Cal. 214, 91 I. C. 824, ('26) A. C. 271.

S. 44 jurisdiction in lunacy is also empowered to dissolve a partnership in the case of a partner becoming a lunatic (a). For the purposes of sub-sec. (a), it is not necessary that the partner of unsound mind should be found a lunatic by inquisition.

Sub-sec. (b) : Incapacity.—In *Whitwell v. Arthur* (b) the incapacity was due to paralysis ; as, however, the health of the partner improved before the trial, further proceedings were stayed, but liberty to apply was reserved. Where a partner is imprisoned for a long period of time, the Court may dissolve the partnership.

Sub-sec. (c) : Misconduct.—The misconduct must be such as is likely to affect prejudicially the carrying on of the business, and it must be wilful misconduct. This sub-section might cover a case in which one partner commits misconduct, though not in the actual business, which destroys mutual confidence, e.g., adultery with a co-partner's wife (c). The Courts, however, might be astute, at need, to bring the facts within sub-sec. (f) or (g).

Sub-sec. (d) : Breaches of agreement.—Persistent refusal or neglect to attend to the business is a good ground for a dissolution (d). Neglect to account (e), and the taking away of partnership books (f) are other instances. Under this sub-section, as in sub-sec. (c), the guilty party cannot ask for dissolution.

Sub-sec. (f) : Business carried on at a loss.—When the business of the partnership cannot be carried on except at a loss, the Court may, in its discretion, dissolve the partnership before the expiration of its term. If the trial judge orders a dissolution neither capriciously nor without disregard of legal principles, the exercise of the discretion is not open to review upon appeal (g).

Sub-sec. (g) : Any other ground.—In *Atwood v. Maude* (h) Lord Cairns said : " It is evident that in every partnership such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either." All matters which would not strictly fall under the sub-sections, would fall under this sub-section.

✓ Adultery with a co-partner's wife has been held to be a fit ground for decreeing dissolution (i), and such a case seems naturally to fall under this sub-section.

(a) Sec. 52 of Indian Lunacy Act, 1912.

(b) (1865) 35 Beav. 140.

(c) *Abbot v. Crump* (1870) 5 Beng. L. R. 109.

(d) *Krishnamachariar v. Sankarah Sah* (1920) 22 Bom. L. R. 1343, 57 I. C. 713 (P. C.).

(e) *Cheesman v. Price* (1865) 35 Beav. 142.

(f) *Charlton v. Poulter* (1753) 19 Ves. 148m.

(g) *Rehmat-un-Nissa Begam v. Price* (1917) 45 I. A. 61, 42 Bom. 380, 45 I. C. 568.

(h) (1868) L. R. 3 Ch. at p. 373.

(i) *Abbot v. Crump* (1870) 5 Beng. L. R. 109.

45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

Example.—The first part of the section may be illustrated by the following illustration:—

Illustration.

A and B trade together in partnership. They execute a deed declaring that the partnership is dissolved as from the 1st of January; they do not give public notice of the dissolution, but continue the business. In February A endorses a bill in the partnership name to C, who is not aware of the dissolution. The firm is liable on the bill: *Ex parte Robinson* (1833) 3 D. & Ch. at p. 338.

Dormant partner.—See note "Proviso" under sec. 32.

Costs incurred in a suit authorized by the firm before dissolution of the partnership are not affected by this sub-section, for they are within the obligation of the original retainer so long as it has not been determined (j).

Deceased partner's estate.—"It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partner" (k). It is immaterial if the obligation was incurred towards a creditor who believed the deceased partner to be living and a member of the firm (l). Where money is borrowed by surviving partners to pay for and take delivery of goods ordered by the firm in the lifetime of the deceased partner, the estate of the deceased is not liable for the debt. All that the creditor is entitled to is a personal decree against the surviving partners and a decree against the partnership assets in the hands of those partners (m).

Insolvency of partner.—The estate of a partner who is adjudged an insolvent is not liable for acts done by the firm after the date of the order of adjudication, for that is the date on which he ceases to be a partner (n).

Notice.—In the case of a person dying, or a dormant partner retiring, or a partner being adjudicated an insolvent, no liability attaches to their estate even though no public notice was given that they have ceased to be partners.

- (j) *Court v. Berlin* (1897) 2 Q.B. 396.
 (k) *Dowse v. Gorton* (1891) A. C. 190.
 (l) *Neel Gomul Mookerjee v. Bipro Dass*
 (1901) 28 Cal. 597.

- (m) *Seshi Ammal v. Vairavan Chettiar*
 (1919) 42 Mad. 1535 Mad. L. J.
 669, 47 I. C. 958.
 (n) Sec. 34.

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✓ Public notice (o) may be given by any partner of the fact of dissolution.

46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Nature of right.—The right of a partner as against other partners to enforce payment of partnership debts out of the partnership property is in the nature of an *equitable lien*, which has nothing to do with possessions and is to be distinguished from *possessory liens*, familiar in several heads of the Common Law (p). Such right of a partner is known as a partner's lien.

Dissolution and account.—No suit will lie as a general rule by one partner against another for partnership accounts without praying a dissolution (q). In such a suit all partners are necessary parties and the legal representatives of deceased partners must also be made parties if they have an interest in the partnership accounts (r). But if the suit is for the dissolution of a subordinate partnership the members of the superior partnership of which the suit firm is a partner as one unit is not a necessary party (s). Each party is bound to produce and discover all documents relating to the partnership. If the commissioner appointed for the purpose takes accounts without production and discovery of the partnership books and documents, the account will have to be investigated afresh (t). The accounts of the partnership should be fully analyzed and a statement prepared of the assets and liabilities of the firm and a scheme of distribution made according to the terms of the partnership (u). ✓ If a partner, on behalf of the firm, with the express or implied consent of the other partners spends sums of money on bribes, credit should be given to him for such sums in the taking of accounts, the question whether the expenditure on bribes was opposed to public policy being irrelevant, as the bribes in such a case are not the consideration of a contract which is sought to be enforced by the partners (u1). If one of the partners is a subordinate partnership, the shares of the members of the subordinate partnership may be decreed in a lump sum (v). In a case in which the decree as to the share of a partner was merely declaratory and not framed in an executable form that partner's representative was allowed after the partner's decease to file a fresh suit for the amount

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| (o) As defined in sec. 72. | (t) <i>Dwarka Nath v. Haji Makomed</i> (1915) 17 Bom. L.R. 5. |
| (p) Pollock's Digest, 12th Ed.; 119. | (u) <i>Haveli Shah v. Charan Das</i> ('29) A.P.C. 184, 115 I. O. 727. |
| (q) <i>Kassa Mal v. Gopi</i> (1886) 9 All. 120; <i>Damodara v. Subraya</i> (1917) 33 Mad. L.J. 509, 43 I. C. 217. | (u1) <i>Joti Prasad v. Hardwari Mal</i> (1930) 53 All. 54, 137 I. C. 334, ('32) A. A. 128. |
| (r) <i>Baboo Janokey Doss v. Bindabun Doss</i> (1843) 3 M.I.A. 175. | (v) <i>Ram Singh v. Ramchand Tirath</i> ('36) A.L. 78, 157 I. C. 1113. |
| (s) <i>Sathappa v. Subramaniam</i> ('27) A.P.C. 70, 53 Mad. L.J. 245, 101 I. C. 17. | |

found payable (*w*). All questions arising between the partners out of the partnership transactions should be disposed of in the suit (*x*). Therefore one partner cannot file a separate suit for money lent by him to the firm, for the advance is but an item in the partnership account (*y*).

Partial account without dissolution.—A suit will, however, lie for partial account without a prayer for dissolution if brought on a transaction which does not involve a general account of all partnership dealings. This is necessary, for otherwise as said in an English case (*z*) a partner might be compelled to the alternative of dissolving the partnership or being ruined by a continual violation of partnership control. Thus if by the agreement of partnership the managing partner is to render accounts each year that obligation can be enforced by suit (*a*). Again a partner can sue his co-partners for contribution in respect of moneys borrowed under an express agreement for partnership purposes (*b*), or when he has paid the full amount of a decree against the firm (*c*). And one partner may sue another for advances made by him not to the partnership concern but to the other partner in respect of what he has to contribute to the joint capital (*d*). But if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, which grounds must be alleged by the plaintiff in his pleadings (*d1*).

Settlement of account.—If the partnership account has been settled between the partners, that is a good defence to a suit for accounts. But the Court should come to a clear finding whether there was a settlement, and if so, when (*e*).

Appointment of receiver.—In England the effect of appointing a receiver is, to the extent of the authority delegated to him by the Court, to exclude every one else from exercising the authority of a partner, whether usual or specially regulated by agreement; and if he is also appointed manager, the whole control of the business is transferred to him, subject to the directions of the Court, whose officer he is. Hence a receiver is seldom appointed when a dissolution is not contemplated (*f*), though it can be done (*g*), and a manager never (*h*). Where the partnership is already dissolved it is almost a matter of course, though not a matter of right, to appoint a

(*w*) *Rathan Chand v. Amichand* (1934) 67 M.L.J. 413, 156 I.C. 204, ('34) A.M. 605.

(*z*) *Bhagtidas v. Oliver* (1872) 9 B.H.C. 418.

(*y*) *Rustomji v. Sheth Purshotamdas* (1901) 25 Bom. 606.

(*z*) *Fairbairn v. Weston* (1844) 3 Hare 387.

(*a*) *Binjraj v. Kisanlal* ('33) A.N. 127, 141 I.C. 277.

(*b*) *Durga v. Raghu* (1898) 26 Cal. 254; *Subbarayudu v. Adinarayudu* (1895) 18 Mad. 134.

(*c*) *Ellappa v. Swaminatha* ('33) A.M. 755, 145 I.C. 858.

(*d*) (1901) 25 Bom. 606, *supra*.

(*d1*) *Krishnasurami Naidu v. Jayalakshmi* (1931) 54 Mad. 671, 130 I.G. 766, ('31) A.M. 300.

(*e*) *Rangaswami v. Narayana* (1936) 70 M.L.J. 691, 162 I.C. 266, ('36) A.M. 557.

(*f*) See *Hall v. Hall*, 3 Mac. & G. 79.

(*g*) *Const. v. Harris* (1823) T. & R. 406, 517.

(*h*) *Lindley*, 642.

S. 46 receiver at the instance of a partner (i). On the other hand, where the partnership is not yet dissolved, the appointment of a receiver is not an ordinary incident of an action for dissolution. "The due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets" (j). There must be fraud or gross misconduct of some kind (k), or wilful denial of the complaining partner's rights (l), or persistence, under colour of right, in conduct endangering the assets (m). In such cases the Court will appoint a receiver either before or after a dissolution. "As, in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver, so in the course of winding up the affairs after the determination of the partnership the Court, if necessary, interposes on the same principle" (n). The jurisdiction "is founded on the common right of persons who are interested in property which is in danger to apply for its protection" (o).

Receivers in Indian practice.—The power of Indian Courts to appoint a receiver is now defined by O. 40, r. 1, of the Code of Civil Procedure, 1908. Under that rule a receiver may be appointed "where it appears to the Court to be just and convenient." The High Courts here in their original jurisdiction possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act (p). And when the assets of a partnership are in the hands of a receiver, they cannot be attached by a creditor of the firm without the leave of the Court first obtained, as the assets in such a case are in the hands of the Court through its officer, the receiver; and such leave will not be granted except on such terms as will ensure equality between the creditors (q). The Civil Procedure Code of 1908 (O. 40) assimilates Indian to English practice.

Limitation period for a suit for dissolution.—The period of limitation for a suit for an account and a share of the profits of a dissolved partnership is three years from the date of dissolution (r); and the period is the same even if the instrument of partnership is registered (s).

Assets brought in after dissolution.—"Where after a dissolution and winding up of the partnership affairs an asset falls in, which for

(i) *Pini v. Roncoroni* [1892] 1 Ch. 633.

(j) *Lindley*, 648.

(k) E.g., *Smith v. Jeyes* (1841) 4 Beav. 503.

(l) *Hale v. Hale* (1841) 4 Beav. 369.

(m) *Madwick v. Wimble* (1843) 6 Beav. 495.

(n) Lord Eldon, *Wilson v. Greenwood* (1818) 1 Saw. 471, 481.

(o) Knight Bruce, L. J., *Evans v.*

Coventry (1854) 5 D.M.G. 911, 916.

(p) *Jaikissondas v. Zenabai* (1890) 14 Bom. 431, 434.

(q) *Shidlingappa v. Shankarappa* (1903) 28 Bom. 176.

(r) Limitation Act, 1908, Sch. I. art. 106. See *Sudarsanam v. Narasimhulu* (1901) 25 Mad. 149.

(s) *Vairavan v. Ponnayya* (1898) 22 Mad. 14.

any reason has not been taken into account, it ought to be divided between the ex-partners or their representatives, according to their shares in the former partnership." But if there has been no taking of accounts and no final settlement, the proper remedy is to have the accounts of the partnership taken; and if it is too late to do that it is too late to claim a share in the newly recovered asset; for the plaintiff could not make such a claim good without showing that he would be entitled to that share upon the due taking of the accounts (t). It is open, however, to the partners to come together and agree to an account among themselves even after the expiry of three years from date of dissolution; and such a settlement is supported by consideration, as all of them make mutual promises to abide by such settlement (u).

Costs in a suit for dissolution.—Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing (v).

Interest.—Interest on any sum found due to a partner runs only from the date of the final decree by which it is found due. A partner is not generally chargeable with interest on overdrawings (w).

47. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

"So far as may be necessary."—After dissolution the partnership continues for the purpose of the winding up the business. Thus any generally acting partner may sell or pledge partnership property to satisfy an obligation of the firm incurred before dissolution (x). A surviving partner has no power

- (t) *Gopala Chetty v. Vijayaraghvachariar* [1922] 1 A.C. 488, 49 I.A. 181, 45 Mad. 378, 24 Bom L.R. 1197, 74 I.C. 621, (22) A.P.C. 115.
(u) *Rochi Ram v. Faizullah* (1933) 37 C.W.N. 580, 35 Bom. L.R. 745, 142 I.C. 549, (33) A.P.C. 120.

- (v) *Ram Chunder v. Manick Chunder* (1881) 7 Cal. 428.
(w) *Suleman v. Abdul Latif* (1930) 57 I.A. 245, 58 Cal. 203, 32 Bom. L. R. 1152, 124 I. C. 891.
(x) *Butchart v. Dresser* (1853) 4 D.M.G. 542, 102 R. R. 269.

- S. 47 even in the course of winding up to renew a promissory note in the name of the firm so as to bind the estate of the deceased partner. The contrary view (y) taken by the High Court of Bombay is, it is submitted, erroneous. But where a partnership is dissolved on the terms of one partner taking over the business and assets, the partner who has taken them accordingly has no authority to bind the outgoing partner by making negotiable instruments in the name of the old firm (z).

A retiring partner may give special and larger authority, however, if he thinks fit, and this may rather be expected while the winding up of business is actively proceeding. Leaving assets in a continuing partner's hands for the purpose of winding up the concern is different from turning over the whole future benefit and responsibility to him as a purchaser (a). The executors of a deceased partner are not entitled, on dissolution of the partnership, to join the surviving partners in the winding up, but they have a right to inspect and challenge the accounts.

Use of firm name.—See notes to sec. 53.

Liability for insolvent partner.—The firm is in no case bound by the acts of a partner who has been adjudged insolvent. But if a person represents himself or knowingly permits himself to be represented as a partner of the insolvent, he will be liable for the acts of the insolvent. The estate of the insolvent, however, will be liable for the acts of a solvent partner during the course of the winding up.

Illustration.

✓ A and B trade together in partnership. A is adjudged an insolvent. B in winding up the firm pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against the Official Assignee: *Woodbridge v. Swann* (1833) 4 B. & Ad. 633, 38 R. R. 337.

It should be noted however that under the Act an insolvent partner ceases to be a partner on the date of the order of adjudication (b), and therefore all acts done by him up to the date of the order of adjudication are binding on the firm.

Illustration.

A and B are partners. A commits an act of insolvency and afterwards indorses in the name of the firm a bill belonging to the partnership. Thereafter A is adjudged an insolvent. The indorsee acquires a good title in the bill (c).

(y) *Markandrai v. Virendrarai* (1917) 19 Bom. L.R. 837, 842.

(z) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 38 R. R. 237.

(a) *Smith v. Winter* (1838) 4 M. & W. 454, 51 R. R. 678.

(b) See sec. 34.

(c) In this respect English law is different. Under English law the indorsee acquires no property in the bill, as the insolvent partner ceases to be a partner from the date of the commencement of insolvency.

48. In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

Mode of settlement
of accounts between
partners.

- (a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—
 - (i) in paying the debts of the firm to third parties ;
 - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
 - (iii) in paying to each partner rateably what is due to him on account of capital ; and
 - (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Sub-sec. (a) : Deficiencies of capital.—Money due from the firm to a partner in respect of capital contributed is different from “advances as distinguished from capital” referred to in sub-sec. (b) (ii). Deficiency of capital is a partnership debt, and like other partnership losses, is, in the event of there being insufficient assets, to be made up by contribution (d). They are to be paid, subject to an agreement by the partners, first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

Where partners agree to contribute capital in unequal shares but to divide the profits equally, and the assets prove insufficient to make good the capital, each partner is treated as liable to contribute an equal share of the deficiency and then the assets are applied in paying to each partner rateably what is due to him from the firm in respect of capital (e).

In case one partner is in insolvent circumstances, it is not incumbent on the other solvent partners to contribute towards the share payable by the insolvent partner, for there is nothing in the Act “to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share” (f).

(d) See sec. 13 (b).

(e) *Garner v. Murray* (1904) 1 Ch. 57.

(f) *Garner v. Murray* (1904) 1 Ch. 57, 60.

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Sub-sec. (b) : Assets of firm.—The profits of a firm are what remains out of the assets after paying—

- (1) joint debts to third parties ;
- (2) advances, as distinguished from capital, of each partner ;
- (3) to each partner what is due from the firm to him in respect of capital.

If after the above payments are made, there is a surplus, that surplus is to be divided in the proportion (g) in which profits are to be divided.

In *Nowell v. Nowell* (h) Sir W. M. James, V.C., on this point said : “ Every partnership is a series of partnership adventures ; and if the matter be tested by one adventure, the rule is made very clear. Two persons engage in a speculation, say, in the purchase of £1,000 worth of cotton. One partner has the £1,000 at his command, the other has not. The first partner advances his £1,000 for the purpose of the speculation. If the cotton produces £1,100, the £100 is divided between the two parties. If it only produces £900, could it be contended that the capitalist partner is to put with the entire loss ; and that the game of partnership between the man without money, and the man with, was to be on the principle of “ Heads, I win ; tails you lose ? ”

In the above case each partner would have to contribute £50 towards the loss of capital. The capitalist partner would, therefore, be entitled to £50 from the other partner.

Illustrations.

(1) *A* and *B* trade as partners, and it is agreed that profits should be shared and losses borne equally. On dissolution it is found that *A* has advanced more capital than *B* to the extent of £1,900. The net assets were only £1,400. There is thus a deficiency of capital to the extent of £500. Under sub-section (a) both the partners must contribute in the proportion in which they were entitled to share profits, i.e., equally. Therefore *B* should pay to *A* the sum of £250 : *Nowell v. Nowell* (1869) L. R. 7 Eq. 538.

(2) *A*, *B* and *C* entered into partnership upon the terms that the capital of the business should be contributed in certain unequal shares, and that each partner should be entitled to share equally in the profits. On dissolution £2,500 are due to *A* in respect of capital ; and £266 in respect of advances to the firm.

There is due to *B* in respect of capital a sum of £314 and in respect of advances £148.

After paying the debts of third parties and also the advances of *A* and *B* to the firm, it is found that the deficiency of capital is £340. In other words

(g) See sec. 13 (b).

| (h) (1868) L. R. 7 Eq. 538, 541.

if the residue had been £2,814 there would have been no deficiency, but the residue is in fact only £1,974. Under sub-sec. (a) each partner must contribute equally one-third, i.e., £280, towards the deficiency. *C* is an insolvent and cannot contribute, and neither *A* nor *B* can be called upon to contribute for *C*. By the contributions of *A* and *B* the amount of £1,974 increases by £560, i.e., it becomes £2,534. This amount not being sufficient to recoup the entire capital, it must be divided rateably between *A* and *B*. If fractions of a penny are not counted, *A* will get £2,251 4s. 10d., and *B* will get £282 15s. 2d. : *Garner v. Murray* (1904) 1 Ch. 57.

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Assets : Benefit of a contract.—The benefit of a contract may be an asset of a firm. But on dissolution a retiring partner or the representative of a deceased partner is not entitled to participate in such an asset if the benefit is remuneration for services carried on by the continuing or surviving partners (i). But if the contract though made by him on behalf of the firm is one for which he is personally liable and is carried on by him after dissolution it is an asset to be brought into account at a valuation (j).

Costs.—In a suit for accounts after dissolution, a partner's advances (k) and what is due to him in respect of capital (l) are payable out of the assets before the costs of the suit. In *Ross v. White* (m) it was held that the fund in Court representing the partnership assets ought to be applied, first, in payment of the debts, secondly, in payment of the excess of the balance due to the one partner over the balance due to the other, and, thirdly, in payment so far as it would extend, of the costs of the action, and that the rest of the costs should be borne by the partners in proportion to their interests in the partnership.

49. Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Joint and separate debts.—This is an English rule of administration in bankruptcy which was already fixed in the second quarter of the eighteenth

(i) *Bachubai v. Shamji* (1885) 9 Bom. 535, 536.

(j) *Ambler v. Bolton* (1872) L.R. 14 Eq. 127 (an. unassignable mail contract held by a partner).

(k) *Potter v. Jackson* (1880) 13 Ch. D. 845.

(l) *Ross v. White* (1894) 3 Ch. 326.

(m) (1894) 3 Ch. 326.

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century (n). In *Ridgway v. Clare* (o) the Master of the Rolls' statement is thus summed up in the head-note:—

"The distinction between joint and separate assets is not restricted to the cases of a distribution under a bankruptcy or insolvency: it applies equally to the case of the administration of assets of deceased partners.

"In the administration of the assets of a deceased partner, where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner.

"If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share.

"If both the deceased and surviving partners are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied.

"If both partners die before administration takes place, the rule is the same."

50. Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Profits by partner after dissolution and before winding up.—Where a partner, after dissolution and before the affairs of the partnership are wound up, derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay his share to the surviving partner or the representatives of the deceased partner. For a fuller treatment of the subject see commentary to sec. 16 (a).

(n) See sec. 49 (4) of Presidency-towns
Insolvency Act, 1909; sec. 61
(4) of Provincial Insolvency Act,

1920.

(o) (1854) 19 Beav. 111, 115.

Illustrations.

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(1) *A* and *B* carry on business in partnership. The firm holds leaseholds for the purposes of the business. *A* dies. Before the affairs of the firm are completely wound up, the lease expires and *B* renews it. The renewed lease is partnership property : *Clements v. Hall* (1857) 2 De G. & J. 173.

(2) *A*, *B* and *C* are partners. *A* agrees to take a lease in his own name, but in fact for partnership purposes, and dies before the lease is executed. The representatives of *A* cannot deal with the lease without the consent of *B* and *C* : *Alder v. Fouracre* (1818) 3 Swanst. 489.

Proviso.—Where on dissolution a partner has bought the goodwill of the firm, he may use the firm name even before the affairs of the partnership have been completely wound up.

51. Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

Return of premium
on premature dis-
solution.

- (a) the dissolution is mainly due to his own misconduct, or
- (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Principle of the rule.—The language of the section is taken from *Atwood v. Maude* (p) where Lord Cairns, L.C., stated the rule as follows :—

“ If the partner who has received the premium should afterwards commit a breach of the partnership articles, and himself dissolve the partnership, or render its continuance impossible, the Court will not allow him to take advantage of his own wrongful act, but decrees the restitution of a proportion of the premium paid, having regard to the terms of the contract and to the length of time during which the partnership has continued. But, on the other hand, if the partner who has paid the premium is guilty of a like breach of the partnership articles, and is himself the author of the dissolution, the Court will not allow him to found a claim to the restitution of the premium upon his wrongful act.”

(p) (1868) 3 Ch. 369, 372.

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When entitled to return of premium.—In case of earlier dissolution the partner paying the premiums is entitled to a return of a proportionate part of the premium, except when the partnership is dissolved—

- (1) by death of one of the partners ;
- (2) owing to the misconduct of the partner paying the premium ; and
- (3) in pursuance of an agreement, which does not provide for the return of the premium or any part of it.

Where, therefore, the partnership is dissolved—

- (1) without the fault of either party (*q*) ; or
- (2) owing to the fault of both (*r*) ; or
- (3) owing to the fault of the partner receiving the premium (*s*) ; or
- (4) owing to the insolvency of the partner receiving the premium, where the partner paying the premium was not aware of the other's embarrassed circumstances at the time of entering into partnership (*t*),

the partner paying the premium is entitled to a proportionate part of the premium.

Interest whether recoverable.—In calculating what proportion of the premium should be returned, interest on the premium paid is not to be accounted for, as under the contract it belonged to the person who received it (*u*).

Illustrations.

(1) *A* and *B* entered into partnership as solicitors for a term of seven years, *A* paying a premium of £800. *B*, before entering into the partnership, knew that *A* was inexperienced and incompetent. After the expiration of two years *B* complained that *A*'s incompetence was injurious to the business, and called upon him to dissolve the partnership : *A* thereupon files a suit praying for a dissolution and for a return of a proportionate part of the premium. *A* is entitled to the return of a part of the premium proportionate to the unexpired portion of the term : *Atwood v. Maude* (1868) 3 Ch. 369.

(2) *A* and *B* become partners for ten years, *A* paying *B* a premium of £1,000. A quarrel occurs at the end of eight years, both parties being in the wrong, and a dissolution is decreed. *A* is entitled to a return of £200 of the premium from *B* : *Pease v. Hewitt* (1862) 31 Beav. 22.

(*q*) e.g. mere incompetence of the partner paying premium.

(*r*) *Astle v. Wright* (1856) 23 Beav. 77 ;

Bury v. Allen (1845) 1 Coll. 589.

(*s*) See *Bluck v. Capstick* (1879) 12 Ch.

D. 863 ; *Hamil v. Stokes* (1817) 4 Pri. 161.

(*t*) See *Atwood v. Maude* (1868) 3 Ch. at pp. 372-373.

(*u*) *Astle v. Wright* (1856) 23 Beav. 77.

(3) *A* agrees to take *B* into partnership with him for fourteen years, in consideration of a premium of £2,500, one-half of which is to be paid at the signing of the articles, and the other half at the time of the execution of a deed of partnership to be founded on the articles. The articles are signed, the first instalment of the premium is paid and the parties enter into partnership on the 15th February 1842. After the lapse of a few months *A*, under considerable provocation from *B*, excludes *B* from partnership. The partnership is dissolved on 1st July 1843 and no further premium is paid. Both are held to blame.

In the accounts to be taken between *A* and *B*, the latter is to be credited with the whole of the amount of the premium, i.e., £2,500, but to be debited with the unpaid instalment, i.e., £1,250, and with an additional portion of the premium, calculated with reference to the actual duration of the partnership, i.e., £245 19s. 6d. The result is that *B* will be entitled to a return of £2,500—£1,495 19s. 6d.=£1,004 0s. 6d. : *Bury v. Allen* (1845) 1 Coll. 589.

Sub-sec. (b): Dissolution by mutual agreement.—If by mutual agreement the partnership is dissolved before the expiry of the term fixed, and nothing is provided at the time of the dissolution for the return of the premium, the partner, who paid the premium, cannot afterwards claim to have any part of it returned (v).

No return of premium in case of death.—The party paying the premium is not entitled to a return of any part of the premium on the death of his partner before the expiry of the term fixed, as it is an implied term of the contract that the partnership should last for the fixed period, provided both be alive (w). In *Whincup v. Hughes* (x) Brett, J., explained the principle as follows: "The case does not fall within the rule as to a total failure of consideration, nor within the rule as to a mutual rescission of contract, but within the rule that where a special sum is paid for a special consideration, and there is a partial failure, a party cannot recover even part."

Insolvency of partner.—Where a partner, who has paid a premium had at the time of the contract of partnership notice of the embarrassed circumstances of his partner, the partner paying the premium is not entitled to the return of any part of it on the insolvency of the partner receiving the premium (y). Where, however, there is no similar notice of the embarrassed circumstances of the partner, a portion of the premium is returnable on the insolvency of that partner (z).

(v) *Lee v. Page* (1851) 30 L.J. Ch. 857.

(w) Per Willes, J., in *Whincup v. Hughes* (1871) 40 L. J. C. P. 104, 107.

(x) *Ibid*, at p. 109.

(y) *Akhurst v. Jackson* (1818) 1 Wils. (Ch.) 47.

(z) *Freeland v. Stansfield* (1853) 2 Sum. & G. 479. See *Atwood v. Maude* (1868) 3 Ch. at pp. 372-373.

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Partnership at will.—The section applies only to partnerships for a fixed term, and not to a partnership at will. In the case of a partnership at will, the premium is not returnable on dissolution, in the absence of fraud, or an express stipulation on the point (a).

52. Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

Rights where partnership contract is rescinded for fraud or misrepresentation.

- (a) to a lien on, or a right of retention of the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;
- (b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and
- (c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Partnership contracts.—A partnership contract is one which requires the utmost good faith and this duty “extends to persons negotiating for a partnership, but between whom no partnership as yet exists” (b).

Rights of a partner on rescission.—This section lays down the rights of a partner on his rescinding the contract, but these rights he is entitled to only against his partner. But as against third parties, it is no defence that he was fraudulently induced to become a partner. Such a contract is voidable, and until the contract is rescinded, all the partners are liable to creditors (c).

Illustrations.

A fraudulently induces *B* to enter into partnership with him—*B* pays *A* a premium of Rs. 5,000. Within a few months the firm incurs liabilities to the extent of Rs. 10,000, and on discovering the fraud *B* files a suit for the rescission of the contract creating partnership, and the contract is rescinded. In the meanwhile creditors of the firm levy attachment on *B*, who pays Rs. 3,000 to the creditors. *B* on rescinding the contract is entitled to a decree for Rs. 5,000 and Rs. 3,000 against *A*, and is entitled to a lien for the said amounts on the

(a) See observations in *Tattersall v. Groote* (1800) 2 Bos. & P. 131, at p. 134.

(b) Lindley, pp. 290, 389, 402.

(c) *Re Hooper, Ex parte Broome* (1811) 1 Rose 69, 71.

assets of the firm. He is also entitled to a declaration that *A* is bound to indemnify *B* against all outstanding debts, claims, demands, and liabilities which *B* has become or may become liable to pay : *Newbigging v. Adam* (1887) 34 Ch. D. 582 ; *Mycock v. Baetson* (1879) 13 Ch. D. 384 ; *Redgrave v. Hurd* (1881) 20 Ch. D. 1.

53. After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :
 Right to restrain from use of firm name or firm property.
 Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Use of firm name.—A surviving partner, while he has authority to act for the best interest of the business, is bound not to act in such a manner as to destroy any part of its value. It is quite settled in our modern law that the goodwill is an asset of the firm and does not, as once supposed, “survive” to the continuing partner alone. Certainly one partner may be restrained from using the firm name or the firm’s property to do business for his own exclusive profit pending the liquidation of the partnership affairs (*d*). After dissolution and liquidation of a firm there is no exclusive right to the use of the old name unless it has been so agreed ; but it must not be used so as to expose a former partner to liability on the ground of “holding out” (*e*). Whether there is any substantial risk of that kind is a question of fact in each case.

Proviso.—See proviso to sec. 50.

54. Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.
 Agreements in restraint of trade.

See commentaries to sec. 27 in the Contract Act.

Exception 2 to sec. 27 of the Indian Contract Act has been repealed by sec. 73, and re-enacted in this section.

(*d*) *Turner v. Major* (1882) 3 Giff. 442. | (*e*) *Burchell v. Wilde* (1906) 1 Ch. 551.

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55. (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

This section should be read together with sec. 36. Under the Act the principles applicable to the use of the firm name are the same as those applicable to the sale of goodwill after dissolution. Whereas sec. 36 deals with the rights of outgoing and continuing partners, sec. 55 deals with the rights of buyers and sellers of goodwill.

Goodwill.—Under sec. 14 “goodwill” is an asset of the firm. It may be sold separately or along with the other property of the firm.

Nature of goodwill.—See note “Goodwill” under sec. 14.

Valuation of goodwill.—In valuing the goodwill the Court should set such a value upon it as it might consider to have been attached to the business at the date of dissolution, and the value (if any) of the goodwill ought to be appraised on the footing that, if it were sold, the old partners would be at liberty to carry on a rival business, but would not have the right to solicit any person who was a customer of the old firm, or the right to carry on business under the firm name (f).

Where goodwill not sold.—Upon the dissolution of a partnership, without any sale or assignment of the goodwill, and without any provision

(f) *Re David and Matthews* (1899) 1 Ch. 378.

as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability. Whether there will be any such risk is a matter to be determined having regard to the circumstances of each case (g).

Illustration.

J. W. Burchell, C. T. D. Burchell, and W. G. Wilde carried on business as solicitors under the style of "*Burchell & Co.*" The partnership was dissolved by consent, there being no sale of the goodwill and no provision as to the use of the firm name. Thereafter *J. W. Burchell* and *C. T. D. Burchell* carried on business as solicitors under the style of "*Burchells & Co.*" *Wilde* and his son carried on business under the style of "*Burchell & Co.*" It was held that the business being one of solicitors, there was no substantial risk of the *Burchells* being held liable, and therefore *Wilde* and his son were entitled to carry on business under the style of "*Burchell & Co.*": *Burchell v. Wilde* (1900) 1 Ch. 551.

Sub-sec. (2) : Where goodwill sold.—Where the goodwill is sold the vendor may carry on a business competing with that of the buyer, and may advertise such business but, unless there is a contract to the contrary, he may not—

- (a) use the firm name; or
- (b) represent himself as carrying on the old firm; or
- (c) solicit old customers.

The vendor may even deal with customers of the old firm, provided they come to him of their own accord (h).

Represent himself as carrying on the old firm.—The vendor may advertise the fact that he has been with the old firm, but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or in any way connected with it (i).

Illustration.

One *Hookham*, an old established tailor, took one *Pottage* into partnership, and they carried on business under the style of "*Hookham and Pottage.*" The partnership was afterwards dissolved by a decree of the Court in which it was provided that the goodwill should belong to *Hookham*. *Hookham* continued the business under the name of "*Hookham & Co.*" *Pottage* set up a shop only a few doors from that business, and painted over the door the words "*Pottage from Hookham and Pottage.*" It was held that having regard to the manner in which the names were painted up, *Pottage* had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and *Hookham* was therefore entitled to an injunction: *Hookham v. Pottage* (1872) 8 Ch. 91.

(g) *Burchell v. Wilde* (1900) 1 Ch. 551.

(h) *Leggott v. Barrett* (1880) 15 Ch. D.

306, 310, 313, 315.

(i) *Hookham v. Pottage* (1872) 8 Ch. 91.

S. 55

Use of firm name.—The name under which the business is carried on is called the “firm name” (j). The sale of a goodwill includes the right to use the firm name, unless it would lead people to believe that the old business was still being carried on, and might cause the vendor to incur liability (k).

Illustrations.

(1) *A* carried on business under the name of “*Madame Elise*,” which was the name of his wife. *A* sold his business with the goodwill, together with the exclusive right of using the name of “*Madame Elise and Company*.” The buyer persisted in using the name “*Madame Elise*.” It was held that the purchaser was not entitled to trade under the old name alone, inasmuch as it would lead people to believe that the old business was still being carried on, and might cause the vendor to incur liability : *Chatteris v. Isaacson* (1887) 57 L. T. 177.

(2) One *Townsend* and one *E. J. Jarman* carried on business under the style of “*Jarman & Co.*” Thereafter there was a dissolution, and *E. J. Jarman* assigned the goodwill to *Townsend*, who carried on the business under the name of “*Jarman & Co.*” In a few months *E. J. Jarman* brought out a similar business in the same locality under the name of “*Jarman and Jarman*.” In a suit by *Townsend*, it was held that *E. J. Jarman* should be restrained from carrying on business in the name of “*Jarman and Jarman*,” or “*Jarman & Co.*” but that there was no objection to his trading in the name of “*E. J. Jarman*.” It was also held that there was no appreciable risk to the defendant in the plaintiff carrying on the business in the name of “*Jarman & Co.*” : *Townsend v. Jarman* (1900) 2 Ch. 698.

Soliciting old customers.—Under cl. (c) the vendor cannot solicit the customers of the old firm. In *Curl Brothers Ltd. v. Webster* (l), Farwell, J., applied this rule to the case of an old customer, who had of his own accord dealt with the new firm set up by the vendor.

Illustration.

A sells the goodwill of his business to *B*, and sets up a new business. *X*, who was and remains a customer of the old firm, deals of his own accord with the new firm set up by *A*. *A* is not entitled to solicit even such a customer as *X*, though if *X* continues to deal with *A* of his own accord, *A* would be entitled to deal with him : *Curl Brothers Ltd. v. Webster* (1904) 1 Ch. 685.

Sub-sec. (3) : Restraint of trade.—Agreements between partners of the kind recognized by this sub-section have been allowed in England ever since there has been any settled partnership law, and are exceedingly common ; indeed, some such clause is rarely absent from partnership articles.

(j) Sec. 4. See note “Firm name” under sec. 4.

(k) *Chatteris v. Isaacson* (1887) 57 L. T.

177.

(l) *Curl Brothers Ltd. v. Webster* (1904) Ch. 685.

CHAPTER VII.

Registration of Firms.

56. The Governor General in Council may, by notification S. 56
Power to exempt from application of this Chapter. in the Gazette of India, direct that the provisions of this Chapter shall not apply to any province or to any part thereof specified in the notification.

This chapter provides for the registration of firms, the object being that a third party dealing with a firm may know who are the partners in that firm. The sections on the whole provide for acts which are of a ministerial nature, although certain sections are so framed as to affect the rights of partners *inter se* and against third parties.

The outlines of the scheme are briefly stated in the Report of the Special Committee as follows :—"The English precedent in so far as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small and ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned ; but following the English precedent, any firm which is not registered will be unable to enforce its claims against third parties in the civil courts ; and any partner who is not registered will be unable to enforce his claims either against third parties or against his fellow partners. One exception to this disability is made—any unregistered partner in any firm, registered or unregistered, may sue for dissolution of the firm. This exception is made on the principle that registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register ; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left intact."

The scheme of this chapter may also be elucidated with the assistance of an illustration.

Illustration.

A, B & Co. is a newly constituted firm and commences business without registering their firm. *X* is their creditor and *Y* their debtor. *X* may sue *A, B & Co.*, but *A, B & Co.*, or the partners thereof, cannot sue *Y*, who is their debtor, unless before instituting the suit they effect registration of their firm under the Act (*m*). Even in the suit by *X* against *A, B & Co.*,

(*m*) Sec. 69 (2).

Ss. *A, B & Co.* cannot claim a set off against *X*, unless the firm is registered under the Act (*n*).

56-58

If, however, the partners in *A, B & Co.* wish to dissolve the partnership, they may file a suit for dissolution although the firm is not registered or they may file a suit against the debtors of the firm after dissolution (*o*). But one of the partners may not file a suit against the other partners, *e.g.*, for contribution for moneys borrowed by him under an express agreement for the purposes of the partnership, unless the firm is registered (*p*).

Where the firm is registered, the statements required by, and made under sec. 58 will be conclusive evidence against each of the partners under sec. 68.

57. (1) The Local Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

Appointment
Registrars.

of

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

The Government of Bombay have appointed the Registrar of Joint Stock Companies at Bombay to be the Registrar of Firms for the whole of the Bombay Presidency excluding Sind, and the Registrar of the Court of the Judicial Commissioner of Sind at Karachi to be the Registrar of Firms for Sind.

58. (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

Application for re-
gistration.

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm.

(*n*) Sec. 69 (3).

(*o*) Sec. 69 (3) (a).

(*p*) Sec. 69 (1).

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely:—

“Crown,” “Emperor,” “Empress,” “Empire,” “Imperial,” “King,” “Queen,” “Royal” or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except when the Governor General in Council signifies his consent to the use of such words as part of the firm name by order in writing under the hand of one of the Secretaries of the Government of India.

59. When the Registrar is satisfied that the provisions of section 58 have been duly complied with,

Registration.

he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration,

Recording of alterations in firm name and principal place of business.

and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

Noting of closing and opening of branches.

Ss.
56-58

A, B & Co. cannot claim a set off against *X*, unless the firm is registered under the Act (n).

If, however, the partners in *A, B & Co.* wish to dissolve the partnership, they may file a suit for dissolution although the firm is not registered or they may file a suit against the debtors of the firm after dissolution (o). But one of the partners may not file a suit against the other partners, *e.g.*, for contribution for moneys borrowed by him under an express agreement for the purposes of the partnership, unless the firm is registered (p).

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Application for re-
gistration.

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm.

(n) Sec. 69 (3).

(o) Sec. 69 (3) (a).

(p) Sec. 69 (1).

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

Ss.
58-61

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely :—

“Crown,” “Emperor,” “Empress,” “Empire,” “Imperial,” “King,” “Queen,” “Royal” or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except when the Governor General in Council signifies his consent to the use of such words as part of the firm name by order in writing under the hand of one of the Secretaries of the Government of India.

59. When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

Registration.

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

Recording of alterations in firm name and principal place of business.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

Noting of closing and opening of branches.

Ss.
62-65

62. When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

Noting of changes
in names and ad-
dresses of partners.

63. (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

Recording of with-
drawal of a minor.

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

64. (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

Rectification of mis-
takes.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

65. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

Amendment of Regis-
ter by order of Court.

66. (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

Inspection of Register
and filed documents.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

67. The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

Grant of copies.

68. (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

Rules of evidence.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

Object of the section.—The object of this section is to compel members of a firm to have all subsequent changes in the constitution of a registered firm notified to or “registered” with the Registrar of Firms. This object is carried out by providing that any statement, intimation or notice recorded in the Register shall be *conclusive proof* of the fact stated therein, as against any person by whom or on whose behalf the same was signed; in other words, he will not be able to set up a state of affairs different from that which he has caused to be stated in the Register. The importance, or rather the compelling force of the section may be shown by the following example :

Illustration.

A, B and C are partners in a registered firm. *A* retires. It will be as necessary for *A* as for *B* and *C* to give public notice of his retirement—which, under sec. 72 of the Act, *includes* notice to the Registrar. If this is not done, *A* will be as much liable for the acts of the continuing partners or of the firm as if *A* had continued to be a member of the firm. And on the other hand the firm will be liable for any act purporting to be done by *A* on behalf of the firm after retirement—see sec. 32 (3).

[*Note* :—The same considerations will apply when *A* is expelled—see sec. 33; but not if *A* dies or becomes insolvent—see secs. 34 and 35.]

S. 69

69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

- (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm, or
 - (b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.
- (4) This section shall not apply—
- (a) to firms or to partners in firms which have no place of business in British India, or whose places of business in British India are situated in areas to which, by notification under section 56, this Chapter does not apply, or
 - (b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Application of the Section.—This section does not come into operation until the 1st October 1933—see sec. 1 (3).

Ss.
69-71

Object of the Section.—By providing certain disabilities, this section renders the registration of a firm compulsory. The disabilities provided are, that without registration

- (a) a firm may not enforce in a court of law its dues from third parties; nor will the partners be enabled to do so by filing a suit in their own names instead of in the name of the firm,
- (b) a partner will not be entitled to recover through a Court his dues from the firm or from his fellow partners, though he may sue for dissolution, or pray for accounts and realisation of his share where the firm has been actually dissolved,
- (c) neither the firm nor the partners will, when sued, be entitled to counterclaim or set-off.

It should be noted that this section does not affect the right of a *third party* to proceed *against* the firm or its partners, even though unregistered, nor does it affect the right of an official assignee to realize the property of an insolvent partner.

It is also important to note that the Act does not say that any transaction of an unregistered firm will be invalid; it merely says that a firm will not be allowed to take the assistance of a Civil Court except upon the *condition precedent* that it is registered. Registration may be effected by a firm *at any time*, before filing a suit or taking other civil proceedings in a Court against third parties.

Sub-sec. 4 (b).—This exception was inserted in the interest of firms in a small way of business.

70. Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Penalty for furnishing false particulars.

71. (1) The Governor General in Council may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection

Power to make rules.

S. 71 of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The Local Government may make rules—

- (a) prescribing the form of statement submitted under section 58, and of the verification thereof ;
- (b) requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in the prescribed form, and prescribing the form thereof ;
- (c) prescribing the form of the Register of Firms and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein ;
- (d) regulating the procedure of the Registrar when disputes arise ;
- (e) regulating the filing of documents received by the Registrar ;
- (f) prescribing conditions for the inspection of original documents ;
- (g) regulating the grant of copies ;
- (h) regulating the elimination of registers and documents ;
- (i) providing for the maintenance and form of an Index to the Register of Firms ; and
- (j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the conditions of previous publication.

CHAPTER VIII.

Supplemental.

Ss.
72-74Mode of giving public
notice.**72.** A public notice under this Act is given—

- (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and
- (b) in any other case, by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

73. The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof.

Repeals.

74. Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

Savings.

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or any thing done or suffered before the commencement of this Act, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to partnership not expressly repealed by this Act, or
- (e) any rule of insolvency relating to partnership, or
- (f) any rule of law not inconsistent with this Act.

SCHEDULE I.

MAXIMUM FEES.

[See sub-section (1) of section 71.]

Document or act in respect of which the fee is payable.	Maximum fee.
Statement under section 58	Three rupees.
Statement under section 60	One rupee.
Intimation under section 61	One rupee.
Intimation under section 62	One rupee.
Notice under section 63	One rupee.
Application under section 64	One rupee.
Inspection of the Register of Firms under sub- section (1) of section 66.	Eight annas for inspecting one volume of the Register.
Inspection of documents relating to a firm under sub-section (2) of section 66.	Eight annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms	Four annas for each hundred words or part thereof.

SCHEDULE II.

ENACTMENTS REPEALED.

(See section 73.)

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1872	IX	The Indian Contract Act, 1872.	Exceptions 2 & 3 to section 27. The whole of Chapter XI.
1920	Burma VIII.	Act The Burma Registration of Business Names Act, 1920.	The whole.

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